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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

No. 347

FRANK L. SWACKER, JR., etal, and
RAILWAY LABOR EXECUTIVES' ASSOCIATION,

V.

SOUTHERN RAILWAY COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The plaintiffs, Frank L. Swacker, Jr., et al and the Railway Labor Executives' Association, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above captioned consolidated cases on April 20, 1966.

OPINIONS BELOW

The reports of the special master are Appendix A hereto, infra, P. 27, and Appendix B hereto, infra P. 48. The opinion of the district court (Appendix C hereto, infra P. 68) is not reported. The opinion of the Court of Appeals for the Fourth Circuit (Appendix D hereto, infra, P. 96) has not yet been reported.

JURISDICTION

The U. S. District Court had jurisdiction by reason of the fact that the suits were brought under and by virtue of an order entered by the Interstate Commerce Commission. The judgment of the Court of Appeals was entered on April 20, 1966. The order staying the issuance of a certified copy of the judgment of the Court of Appeals pending application for a Writ of Certiorari was entered May 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. As a condition for approval of the acquisition of 100% of the stock of the Interstate Railroad Company by the Southern Railway Company the Interstate Commerce Commission imposed the New Orleans Conditions (282 I.C.C. 271) which also included the Washington Job Protection Agreement of May, 1936. In view of these facts did the Court err in these cases by ignoring both the Washington Agreement and the New Orleans Conditions and substituting therefor provisions which were less favorable to the Plaintiffs and were foreign to both the Washington Agreement and the New Orleans Conditions?

2. The Southern admitted and both the Master and District Court held that the plaintiff section laborers were adversely affected as to their employment by the acquisition of Interstate by the Southern but the Master and District Court held that the affect was the result of "subsequent technological improvements" within the meaning of the Central of Georgia Case (RLEA v. U.S. etal, Civil Docket 3004, 226 F. Supp. 521) and thus not covered by the New Orleans

Conditions which were imposed in the instant case. Southern's counsel (Southern's Reply Brief pages 23-26) agreed that the plaintiff section laborers were entitled to recover unless the facts substantiated such "subsequent technological improvements" as to be too remote to be covered by the conditions. Thus rendering the only question as to the section laborers to be, were they affected by "subsequent technological improvements"? The Court of Appeals evaded this question by holding,

> "It was thus an economy measure which had begun before Southern's acquisition and expanded thereafter. Hence there is no need to consider the question mentioned by the Court and discussed in the briefs and in oral argument, or whether or not a technological improvement adopted after the acquisition of control is a factor of prejudice to a former or furloughed employee." (Opinion p. 17, App. 112)

Was the Court of Appeals clearly erroneous in this holding when there is no evidence to support it, and when in fact the evidence is uncontradicted that had there been no acquisition that Interstate planned to continue to maintain its tracks by hand (Pl's App. 117)?

3. As concerns the 7 plaintiffs who were Clerks, the Court found, ". . . the District Judge concluded that none of these 7 were furloughed by reason, or in anticipation, of Southern's acquisition." (Opinion p. 18, App. 113)

Whether this finding which is contrary to the uncontradicted facts, can stand?

STATUTES INVOLVED

49 USC 5(2)(f) provides:

> "As a condition to its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order, such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

STATEMENT OF THE CASE

This litigation concerns two consolidated cases, each brought by or on behalf of railroad employees in the U. S. District Court For The Western District of Virginia to

enforce an order which imposed conditions for the employees upon the defendant, Southern Railway Company, as conditions for the Southern Railway Company's permission to acquire control of the Interstate Railroad Company in the matter of Southern Railway Company's Control of Interstate Railroad Company (Finance Docket 20675) before the Interstate Commerce Commission.

A. Factual Background

The Interstate Railroad Company is a very small railroad with only 88 miles of track including all of its spur tracks. It needs, and has owned and maintained for the last several years, approximately 3,000, 50-ton hopper-type coal cars to supply its shippers.

Interstate at its Andover shops, with the plaintiff employees, built and maintained all its cars; and maintained all its locomotives, as well as all its other equipment. However, because of the fact that the last cars Interstate built was in 1951 and by the late 1950's many of its cars were getting old; and also the trend in the railroad industry to the 70-ton and 100-ton size cars, Interstate was faced with the problem of replacing practically all of its car fleet within the next few years. This would have been a tremendous burden financially for Interstate amounting to about $25,000,000.

Also the Interstate had no modern track maintenance equipment and was doing it mostly with hand tools. And it was too small a railroad to warrant owning the expensive, modern track equipment because it could neither afford it financially nor keep the equipment busy.

Neither did the Interstate have the modern office machines necessary for efficient operation of a modern railroad on a competitive basis.

Because of these reasons Interstate was willing to sell 100% of its capital stock to Southern from whom it would "inherit" an adequate car supply (Testimony of Mr. Brosnan, Vice-President of Southern, pl's. app. 63); and would also inherit from Southern the modern track maintenance equipment and office equipment it needed.

Therefore Southern applied to the Interstate Commerce Commission on June 12, 1959 for permission to acquire 100% of Interstate. The order of the I. C. C. approving the said acquisition is dated February 16, 1961; and the acquisition became effective June 6, 1961.

As conditions for the permission of Southern to acquire the Interstate the I. C. C. imposed the New Orleans Conditions which were first imposed in the New Orleans Union Passenger Terminal Case, Finance Docket 15920, 282 I.C.C. 271, which include the Washington Job Protection Agreement of 1936, (Def's. Appendix 15d) and sections 4 to 9 inclusive of the Oklahoma Conditions (257 I.C.C. 177).

All parties to these suits agree that the New Orleans Conditions were imposed and are valid and applicable to these suits.

B. The Proceedings in The Court Below

These consolidated cases were referred to a Special Master and tried without a jury.

In the Special Master's preliminary rough draft of his first report, which was mailed to all counsel for suggestions but was never filed in the cases, he found that all 12 of the maintenance of way men (section laborers) should recover their full wages, less other earnings, for four (4) years.

In the Special Master's first report dated March 27, 1964 he held that none of the 52 plaintiffs should recover, in spite of the fact he found all the Section Laborers were affected by the acquisition, saying that they were affected by technological improvements and thus not covered.

The cases were re-referred to the Special Master for further evidence and a supplemental report. His second or supplemental report is dated December 4, 1964 in which he adhered to his findings in his first report as to the section laborers, that none of them should recover although they were affected by the acquisition, because it was technological improvements. He also adhered to his findings in his first report as to the Clerks, but he reversed his former holding as to 21 of the 26 car laborers and held that 25 of the plaintiff employees (21 car laborers and 4 machinists) should recover for and during the period of 4 years from June 6, 1961, the benefits provided in the New Orleans Union Passenger Terminal Case, 282, I.C.C. 271.

The District Court affirmed in part and modified in part the findings of the second report of the Special Master. He held, as did the Special Master, that all the section laborers were affected by the acquisition but shall not recover because they were affected by technological improvements. He found in favor of the same 25 employees (21 car laborers and 4 machinists) as did the Special Mas-

ter, however, the Court limited the recovery of each of said 25 employees to the amount of work actually removed from Interstate to Southern in connection with the repairs of 467 cars rather than the 4 years wages provided for in the New Orleans Conditions.

The District Court apparently did not consider the claims of any of the 7 plaintiff clerks because neither his opinion nor order mentions them or their claims.

The Court of Appeals affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

This Court in Railway Labor Executive's Association v. United States, etal, 339 U.S. 142, 70 S.Ct. 530, decided March 27, 1950, gave an excellent history of the protection afforded railroad employees in consolidation cases from which the following information was obtained:

Long before statute 49 U.S.C. 5(2)(f) was enacted the I.C.C. imposed conditions as requirements for consolidations "or so-called coordinations" of railroads. Section 49 U.S.C. 5(4)(b) which was enacted as part of the Emergency Railroad Transportation Act of 1933, was the precursor of 49 U.S.C. 5(2)(f). 5(4)(b) authorized the I.C.C. to approve consolidations "upon the terms and conditions . . . . . found to be just and reasonable" but there was no statute specifically requiring the protection of employees affected by consolidations of railroad facilities. The railroad industry recognized that many of the economies to be gained from consolidations could be realized only at the expense of displaced railroad labor; thus in 1936 a

collective bargaining contract was made in which about 85% of the railroad carriers and 20 of the 21 railroad brotherhoods were parties which contract has since been known as the Washington Job Protection Agreement of 1936. And it has since been prescribed by the I.C.C. as conditions in consolidation cases. Southern Railway Company has been a party to this contract since 1940.

In 1939 in the case of United States v. Lowden 308 U.S. 225, 60 S.Ct. 248, 84 L. Ed. 208 this Court held that the I.C.C. "had power to prescribe terms and conditions comparable to those in the Washington Agreement.". The I.C.C. requirements in that case, of a protection period of 5 years was sustained.

Thus at the time of the enactment of 5 (2)(f) in 1940, the I.C.C. "already had power to determine and prescribe just and reasonable terms and conditions to protect employees affected by consolidations."

"The legislative history of section 5(2)(f) shows that one of its principal purposes was to provide mandatory protection for the interest of employees affected by railroad consolidations."

Thus in 1940 congress enacted 49 U.S.C. 5(2)(f) mainly to provide mandatory protection for employees affected by railroad consolidations.

In 1950 in the case of Railway Labor Executive's Association v. United States, etal, 339 U.S. 142, 70 S.Ct. 530 this Court held that the provision of 5(2)(f) are minimum terms and not maximum:

> "We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of section 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of the railroad employees beyond four years from the effective date of the order approving the consolidation."

In 1952 the New Orleans Union Passenger Terminal Case, 282 I.C.C. 271, was decided in which case the conditions were imposed which have since been called the New Orleans Conditions and which were imposed in the case at bar, and includes the Washington Agreement, with minor limitations, and sections 5 through 9 of the Oklahoma conditions, 257 I.C.C. 177, 197.

1. There are no provisions in 5(2)(f) as to how or in what manner an employee has to be affected in order to be covered, nor is there any provision as to the duration of his benefits, except he must be protected for 4 years from the effective date of the order. Therefore, the solution of these cases is found in the provisions of the New Orleans Conditions rather than 5(2)(f). In fact this transaction and these cases would be just as valid if section 5(2)(f) had never been enacted because 5(2)(f) gave the Commission no new authority, it only made its provisions mandatory, but since the New Orleans Conditions more than meet the minimum requirement of 5(2)(f) that section is not involved at all in a determination of these cases.

Therefore, the plaintiffs submit that the Court of Appeals erred when it ignored both the Contract (Washington Agreement) between these parties and also the New Orleans Conditions, and substituted therefor provisions, foreign to both the Washington Agreement and the New Orleans Conditions, which were less favorable to the plaintiffs.

Section 7(c) of the Washington Agreement states clearly when an employee is deemed to be affected:

> "7(c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance in the following cases:
>
> 1. When the position he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation, or
>
> 2. When the position he holds on his home road is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of coordination, or by other employees, brought about as a proximate consequence of the coordination, and if he is unable by the exercise of his seniority rights to secure another position on his home road or a position in the coordinated operation."

The Washington Agreement, the Oklahoma Conditions and the New Orleans Conditions all state plainly the duration of the benefits to which an employee is entitled once he is affected.

Both the Washington Agreement (Section 7(j)) and the Oklahoma Conditions (Section 5) state the same 5 events that will terminate the employee's allowance once it has commenced, otherwise it runs for the full 4 years of the protective period:

1. Failure without good cause to return to service offered work for which he is qualified.
2. Resignation
3. Death
4. Retirement on pension
5. Dismissal for good cause

The Washington Agreement Section 7(a):

> "This coordination allowance will be made to each eligible employee *while unemployed* . . ." (emphasis added)

The Oklahoma Conditions Section 5:

> "This allowance shall be made during the protective period to each dismissed employee *while unemployed*. . ." (emphasis added)

The New Orleans Conditions Section (a):

> "That employees adversely affected within 4 years from the effective date of the order approving the transaction shall receive as a maximum the protection afforded by conditions 4 to 9 inclusive in Oklahoma . . ."

It is clear from a reading of the New Orleans Conditions which include the Washington Agreement and conditions 4 to 9 inclusive of the Oklahoma Conditions, 257 I.C.C. 177, 197, that once an employee is adversely affected by a consolidation (coordination) that he is entitled to the 4 years protective benefits unless they are terminated by one of the 5 ways stated above.

This is the first time any Court in the Country, to our knowledge (and neither the defendant's counsel or the Court has cited any precedent or authority) has construed the employee benefits in a consolidation case of this nature to extend only to a particular amount of work removed. We submit this formula is foreign to anything that has ever been done and foreign to the New Orleans Conditions. We submit that in addition to being clearly erroneous it is impossible of determining. It would raise so many questions that it would be both impractical and impossible to calculate to what a plaintiff would be entitled. Just a few of such questions are: Would the work be on the basis of employees wage rate at time furloughed, at the time work was done, or at the time of the coordination? Would it be on basis of Interstate's wage rate or Southern's? Would the hours necessary for the work be on the basis of how long it would have taken to do it in Interstate's shops or in Southern's much more automated and up to date shops? It would also require an accounting each month for 4 years as to how much work is removed. By applying the court's formula, if the amount of work removed resulted in more compensation to a plaintiff than his 4 years wages would be; he would thus be placed in a better position than if he were working. Also what amount of judgment would the Court have rendered had it held the plaintiffs were affected by some means other than work removed? This shows the

fallacy of the Court's formula for damages. It is also shown by the fact that under section 9 of the Washington Agreement *every employee affected* has an option to resign and receive a lump sum, separation allowance. And the Court's holding completely nullifies that provision.

Moreover the evidence is uncontradicted that the plaintiff car laborers were adversely affected by ways other than removal of work, such as:

A. Elimination of the interchange. (See testimony of Mr. Brosnan, Vice-President of Southern, Pl's Appendix p. 65, 70; and Jesse Reese, Southern's interchange clerk (Pl's Appendix p. 226, 227).

B. Work lessened or disappeared by reason of Interstate's use of Southern's larger cars, without any work being removed, which resulted in savings of $60,000 per year on car labor. (Brosnan's testimony, Pl's Appendix p. 66, 70)

The issues presented in these cases—whether the Court can ignore the New Orleans Conditions and substitute therefor provisions which the I.C.C. has not imposed, and which has never been done before—are of substantial public importance.

The ruling below in these cases potentially affects directly every railroad employee in this country and every citizen indirectly. Today railroad mergers and consolidations are frequent and affect every person in this country because the efficiency of the railroad service is dependent upon the morale of the railroad personnel and that in turn depends largely upon the protection that is afforded the railroad employees in cases of consolidations.

2. As stated in the factual preface to question 2, ante p. 2, both parties as well as the Master and the District Court agree that the plaintiff section laborers were adversely affected, "as a result of" the Southern acquiring Interstate and would be entitled to recover unless they were affected by "subsequent technological improvements" yet the Court of Appeals holds, "there is no need to consider the question . . ." (opinion p. 17, App. 112)

The Court of Appeals in speaking of the plaintiff section laborers (opinion p. 17, App. 112) quotes the District Court as follows:

> "The Master found that these employees would have been called back for work except for the fact that after the acquisition Interstate began to *rent* some modern track and maintenance equipment which has replaced these employees."

This quotation clearly shows that these plaintiffs were adversely affected by the acquisition, therefore, we cannot understand at all why the Court would hold ". . . . there is no need to consider the question. . . ."

The Court further said (opinion P. 17, App. 112) in speaking of the modern track equipment of Southern replacing the Interstate employees, "It was thus an economy measure which had begun before Southern's acquisition and expanded thereafter." There is no evidence to support this finding; in fact the evidence is to the contrary.

In the instant case, as found by the Master, District Court and the Court of Appeals, the section laborers would

have been recalled to work except for the use of Southern's equipment by Interstate. The direct proximate cause of the loss of jobs as shown by the record of this case was the Interstate's use of Southern's equipment which was made possible by the Southern's purchase of Interstate. In fact the defendant's chief witness, H. L. Stuart, Jr., testified that he had tried to get Interstate to purchase some track machinery before the acquisition and it refused (Pl's Appendix 114, 115). And that after the acquisition they purchased it and it replaced 5 or 6 of the plaintiff section men (Pl's Appendix 112, 115). And that the use of Southern's track equipment replaced at least 8 more of the plaintiff section laborers. (Pl's Appendix 117). He also testified (Pl's Appendix 113) that Interstate could not afford to own the big modern track equipment like it used of Southern's because it could not keep the equipment busy; and that Southern would not rent this equipment except to its subsidiaries (Pl's Appendix 113). This is conclusive that without the acquisition Southern's track equipment would not have been loaned or rented to Interstate and the section laborers would now be at work.

The Court (opinion P. 17, App. 112) in quoting the lower court emphasized the word "rent" but it makes no difference whatsoever whether Southern rented Interstate this equipment or loaned it. The only question is "Were the employees affected?" (See R.L.E.A. v. U. S. etal, 216 Fed. Supp. 101 (1963). And everybody concerned agrees they were.

We submit that the Court erred in refusing to decide this issue and that this question is of substantial importance to all railroad employees in this country because as is evidenced by the briefs in these cases and authorities cited

therein the question of what the I.C.C. and the Courts meant by, "subsequent technological improvements" is in doubt, and should be clarified and determined in this case. In addition to potentially affecting all railroad employees in this country it directly and positively affects these 12 section laborers in the amount of their wages for 4 years which would probably amount to $150,000.00 which is clearly of substantial importance to them.

3. The Court of Appeals at p. 18 of its opinion (App. 112, 113) in regard to the 7 Clerks held that,

> "In a general determination covering other claimants also the District Judge concluded that none of these 7 were furloughed by reason, or in anticipation, of Southern's acquisition. These appellants do not show reversible error in this decision."

This is clearly error because no where in the District Court's opinion are the Clerks mentioned at all—there is absolutely no holding at all as to the Clerks. The District Judge in his opinion (App. 71) says,

> "The plaintiffs in this case represent two distinct classes of employees: Maintenance of Ways and structures employees and those other than maintenance of ways and structures. The claims of these two broad groups present substantially different questions of fact and so they will be treated separately in this opinion."

The District Judge then treated those two groups but under the group he designated "those other than maintenance of ways and structures employees" he treats only the car laborers and machinists. He does not hold anything

—in fact he does not mention any of the clerks or say anything about the clerks—thus the finding of the Court of Appeals is clearly erroneous.

The finding of the Court as to the 7 clerks is further clearly erroneous because it does not take into consideration that some of the plaintiffs may have been recalled for work had it not been for the coordination; by which means an employee can be affected as well as having been cut off because of the coordination. The Court considered only the reason for furlough.

The Court's said finding is further clearly erroneous because the evidence is uncontradicted and conclusive that the clerks were affected by the coordination.

The defendant's chief witness, H. L. Stuart, Jr., testified that the Clerk to the Car Accountant was cut off by Southern moving the accounting department to Atlanta (T470). And plaintiff clerk, William Howard Johnson, Jr., was the Clerk to the Car Accountant. Mr. Stuart also admitted that the accounting department was moved to Atlanta as a result of the coordination (Pl's Appendix 183). Another of the plaintiff Clerks, Louise Fletcher, was a clerk in the accounting department (Pl's Appendix 157, Defendant's Exhibit 11) and when the entire accounting department was moved to Atlanta her job was abolished at Andover.

Clerk, Willis M. Jones, janitored the main three story office building and it was torn down as a result of the coordination. Defendant's chief witness testified as follows: (Pl's Appendix 183)

"Q. Now, Mr. Stuart, there has been some mention here you tore down the old office building up there. What happened to the building?

A. The building is torn down. The building was a 3-story structure and housed the general office of Interstate Railroad when it belonged to the Virginia Coal and Iron Co. After Southern Railway acquired Interstate Railroad, the accounting functions were transferred to Atlanta and the engineering functions were transferred to Knoxville, and the result was that there was much more buildings than the new general offices required. This was wasteful, because it had to be heated and maintained, taken care of . . ."

Two plaintiff clerks, Raymond Davidson and Kyle Wampler, were call boys, and defendants chief witness, H. L. Stuart, Jr., admitted that some of the call boys were cut off because of moving the car accounting office to Atlanta, that let other people in more advanced jobs kick the call boys (Pl's Appendix 218, 219, 220).

These facts are from the defendant's own witness and are uncontradicted thus it is clearly erroneous to hold none of them were affected by the acquisition of Interstate by the Southern.

4. The opinions of the District Court and the Court of Appeals show on their face that they are erroneous:

In the opinion of the District Court (App. 77, 78, 79) is found the following:

"It is clear that the employees are entitled to some benefits. However, in assessing the extent of these benefits, I think a definite distinction should be drawn between employees *discharged* and those merely *furloughed,* the former usually being entitled to the full four years' benefits and the latter being entitled to pay only for work actually lost. Although court cases and decisions of the Interstate Commerce Commission are sometimes less lucid on this point, most of them dealing with employees who have been completely discharged, such a distinction would seem to permit a fair application of section 5(2)(f) consonant with legislative intent.

In United States v. Lowden, supra, the case holding that the I.C.C. could constitutionally prescribe protective conditions in railroad acquisitions and mergers. the Supreme Court paraphrased the effect of the order of the Commission thusly:

It (the Commission) accordingly authorized the lease upon the conditions which it has found to be just and reasonable: that for a period not exceeding five years each retained employee should be compensated for any reduction in his salary so long as he is unable, in the exercise of his seniority rights under existing rules and practices, to obtain a position with compensation equal to his compensation at the date of the lease; that dismissed employees unable to obtain equivalent employment be paid partial compensation for the loss of their employment in specified amounts . . . 308 U. S. at 228.

So the four year provision seems to have been meant to partially compensate employees who were discharged by paying them the equivalent of four years' salary ("partial compensation" in the sense that it is assumed that the employee would have remained with the railroad for an indefinite period, longer than four years, drawing full salary). Retained employees were to be compensated for any reduction in salary. Retained employees includes those on furlough.

It must be remembered that these employees were furloughed before the acquisition and not in anticipation of it. Thus, the furlough was not colorable in any sense; Interstate was wholly within its rights in utilizing this common practice which it had employed several times in the past. Assuming no acquisition had taken place, these employees would have been paid only when recalled by Interstate for work. I think, therefore, that they are entitled to protective benefits only when they *should have been* recalled by Interstate and were not because of the acquisition of control by Southern. Any other arrangement would result in these employees receiving benefits during periods for which they would not have been paid had there been no acquisition, and being paid double for periods during which they may be recalled for work in the future (i.e., the regular salary plus the protective benefits.) . . . ."

It is clear from the above quotation that the District Court, based its decision(which was affirmed by Court of Appeals) as to the amount of compensation the plaintiffs. are entitled upon a misinterpretation of the words "discharged," "furloughed," "retained", "dismissed" and "par-

tial compensation" as those terms are used in the New Orleans Conditions, the Washington Agreement and United States v. Lowden.

A "discharged" employee is one who is dismissed for good cause, and would of course be entitled to no benefits. The only plaintiff who was discharged is W. H. Holt. The Southern agrees with this interpretation. (Pl's Appendix p. 176.)

A "retained" employee as used in the above quotation from the Lowden case very clearly means a "displaced employee" within the meaning of section 6 of the Washington Agreement and does not include "furloughed" employees as the District Court has held. In fact the quotation from the Lowden case is couched in practically the same words as are found in section 6 of the Washington Agreement which deals exclusively with "displaced" employees.

"Partial Compensation" in the above quotation from the Lowden case clearly means the compensation to which a dismissed employee would be entitled because of his being "unable to obtain equivalent employment." This of course refers to his full salary less any wages earned elsewhere and less any benefits received under any unemployment insurance law. See the New Orleans Conditions Defendant's Appendix pages 15a and 15b.

The last paragraph of the above quotation from the District Court's opinion, which the Court of Appeals also quoted (opinion p. 14, App. 109), clearly shows that the Court misinterpreted the benefits to which employees are entitled under the New Orleans Conditions because in no event could one be *"paid double"*. (emphasis added.) Under

the conditions any wages and/or insurance benefits received are deducted from an employee's benefits (Defendants Appendix 15a and 15b) and when an employee is "recalled for work" his benefits terminate, unless of course he is recalled to a job with less pay, in which event he would receive benefits as a displaced employee under section 6 of the Washington Agreement.

In the District Court's opinion (App. 84, 85) is the following:

> "For the record, the court affirms the Master's findings that there was no co-ordination within the meaning of the Washington Agreement. The Master expressed this position very well when he said:
>
> > By no stretch of the imagination can it be said that Interstate lost its identity as a separate corporate entity. It is yet a separate corporation operating under its own name, and as such subject to all the rules and regulations of the I.C.C. applicable to railroads. The change is in the ownership of its capital stock which is now owned by Southern. There has been no unification, consolidation or merger. Those terms by their own definition mean a loss of identity, as by the issuance of stock of the controlling corporation to replace that of the corporation being absorbed."

From this quotation it is clear that the Court thinks that before there can be a "coordination" that there must be a complete loss of identity of the companies involved, which of course is not correct, (see section 2(a) Washington Agreement for definition of "coordination".)

The Court's opinion is further erroneous because it denies benefits to plaintiff car laborers, Frazier, Johnson and Slagle, (Court of Appeals Opinion p. 7, App. 102) who are all on the same seniority list as all the 21 plaintiff car laborers for whom the court found a judgment and all of whom have more seniority than eleven (11) of the plaintiffs for whom judgment was rendered (Defendants' Exhibit One). It is impossible for those eleven (11) to have been affected without these three (3) plaintiffs being affected because these three (3) would be entitled to that work ahead of the eleven (11) car laborers with less seniority than them.

The Court of Appeals opinion (P. 9, App. 104) is clearly erroneous in holding that the per diem on cars is based upon "wheelage" records of distance cars are used. Wheelage has nothing whatsoever to do with per diem. Wheelage record is merely the conductor's record of where he picked up and delivered a car. Per diem is based solely upon the railroad upon whose tracks a car is located at midnight of any day. (T85).

Also the Court of Appeals opinion is erroneous in holding (P. 5, App. 100) that "Interstate showed a favorable income balance only by reason of the use of cars of other carriers, the earnings therefrom exceeding the per diem rentals of such cars." The opposite is correct because Interstate's primary income was from renting its cars to other carriers (Pl's Appendix P. 72, Master's Report, App. 35).

It is further erroneous in holding (P. 8, App. 103) that Southern and Interstate paid each other rentals on reciprocal uses of their cars, and (P. 17, App. 112) that Interstate paid rent to Southern for the use of Southern's track

equipment. The uncontradicted evidence is that although they do keep books for I.C.C. purposes that no money is paid for the use of either the cars (Pl's Appendix 104) or the track equipment (Pl's Appendix 111).

The Court of Appeals compounded all the errors of the District Court by affirming its decision.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

SHANNON & NEWMAN
Appalachia, Virginia
By R. C. SHANNON &
CARL W. NEWMAN

and

JOSEPH M. KUCZKO
Norton, Va.
Attorneys for Petitioners

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APPENDIX

APPENDIX A

The Report of the Special Master, Carl W. Hamilton, Dated March 27, 1964:

To Honorable Ted Dalton, Judge of Said Court:

By an order entered in these causes on January 17, 1963, whereby they were referred to the undersigned, Carl W. Hamilton, as a Special Master to report upon findings of fact and conclusions of law as to all issues presented herein, the first meeting was held at the United States District Courthouse, Big Stone Gap, Virginia, on February 5, 1963, at 10:00 A. M., and from time to time thereafter, the dates whereof are recorded by the reporter in her transcript of the evidence.

There were present at the first hearing the following persons:

1. Honorable Ted Dalton, Judge.
2. R. C. Shannon and Carl W. Newman, Attorneys for the Plaintiffs in both above styled cases.
3. L. M. Mullins, R. T. Winston and James I. Hardy, Attorneys for the Defendants.
4. Various interested persons, witnesses and spectators throughout the different meetings.

The opening statements of Counsel were heard by the Judge and Special Master, and thereafter the evidence was introduced which was taken in the presence of the Special

Master by the reporter, Evelyn D. Slemp, and later transcribed by her and the original filed with the Special Master, a copy thereof going to Counsel of either side.

This evidence which consists of four bound volumes, two bound in red covers with the pages numbered from 1 through 729 with the ——— exhibits as a part thereof, and two smaller bound units styled on the outside of each "Railway Labor Executives' Association, et al Vs: Southern Railway Co., et al Civil Action No. 976"; also the Courts file consisting of the original pleadings, etc. in these cases, are returned herewith as a part of the record herein.

For the purposes of this report, the above styled case which is numbered 922, will be referred to as the "Swacker" case and the second styled case above numbered 976, will be referred to as the "RLEA" case.

In this report in many instances, for brevity, Interstate Railroad Company will be termed Interstate and Southern Railway Company as Southern.

STATEMENTS BY THE SPECIAL MASTER OF PROCEEDINGS:

Subsequent to the 26th day of December, 1961, which is the date of the filing of the complaint in the "Swacker" Case, five separate orders have been entered herein in the "Swacker" Case adding twenty-two new plaintiffs to the original twenty-five, and by order of October 8, 1963, the complaint of D. G. McCormack v. Southern Railroad Company, No. 1066, was combined with the foregoing two cases and included for hearing herein, making a total of forty-eight plaintiffs in the above three cases.

In the "RLEA" Case there are twenty-one original plaintiffs.

Four of the plaintiffs, namely: 1. Curtis Holbrook, 2. Beldon Fletcher, 3. Glenn C. Kindle and 4. Fred L. Lane appear as plaintiffs in both the "Swacker" and "RLEA" cases. These four plaintiffs have elected to remain as plaintiffs in the "Swacker" case and to be stricken as plaintiffs in the "RLEA" case. This request has been granted by the Special Master.

In the "Swacker" case, the plaintiffs: 1. Frank South, 2. James C. Cooper, and 3. D. W. Dye failed to appear at any of the hearings to offer evidence and none was introduced in their behalf. Accordingly this case should be dismissed as to the said three plaintiffs and your Special Master so ruled.

In the "RLEA" Case, the following five plaintiffs failed to appear and it was stated by their Counsel that they were no longer asserting any claim herein:

1. Bennett, Roy H.
2. Rowland, Leonard L.
3. Davis, Charles D.
4. Mefford, Eugene T.
5. Underwood, Howard W.

Whereupon the Special Master has dismissed this complaint as to these five plaintiffs.

And in the "RLEA" Case, five additional plaintiffs failed to appear with any evidence and no effort was made to prosecute the case on their behalf, namely:

1. Bledsoe, C. H.
2. Lambert, Gilmer
3. Garrett, James W.
4. Leonard, Isaac G.
5. Kilgore, Willard D.

Whereupon your Special Master has dismissed this complaint as to these five plaintiffs, but without prejudice as to their right to institute a new suit. ("RLEA" Evidence No. 2, pages 9 and 10.)

It was agreed between Counsel for plaintiffs and defendants that the Interstate Railroad Company is not a proper defendant in either of these cases and that the same should be dismissed as to it. (Record page 407.) Your Special Master finds that the Interstate Railroad Company was not a party to the proceedings before the Interstate Commerce Commission, and concurs in the agreement reaced by Counsel and reports that the defendant, Interstate Railroad Company should be stricken as a party defendant in each case.

The Southern Railway Company was made a party defendant in the "RLEA Case, but was not a party defendant in the "Swacker" Case. However, Southern Railway Company has filed its answer in the "Swacker" Case and by order of this Court dated July 31, 1962, was made a party defendant.

Thus for the purpose of this report, the "Swacker" Case has remaining for consideration the claims of forty-five plaintiffs, and the "RLEA" Case has remaining for consideration the claims of seven plaintiffs. These remaining plaintiffs in each case are listed below and for convenience. I have set opposite each name the job classification and date furloughed or discharged:

1. Remaining Plaintiffs in the "SWACKER" Case

Names:	Job Classification:	Date Furloughed or Discharged:
1. Swacker, Frank L., Jr.	Car Laborer	May 24, 1960
2. Flores, Coy	Boiler Fireman	May 23, 1960
3. Holbrook, Curtis	Section Laborer	January 9, 1961
4. Reed,H. H.	Car Laborer	December 30, 1960
5. Frazier, G. M.	Car Laborer	May 24, 1960
6. Clark, Elmer	Car Laborer	May 24, 1960
7. Tignor, Lloyd	Car Laborer	May 24, 1960
8. Johnson, Milford V.	Car Laborer	May 24, 1960
9. Clark, E. P.	Car Laborer	December 30, 1960
10. Weatherly, Coy	Car Laborer	December 30, 1960
11. Clark, E. F.	Car Laborer	December 30, 1960
12. Aistrop, Dewey	Car Laborer	December 30, 1960
13. Kindle, Glen C.	Section Laborer	January 6, 1961
14. Slagle, Ralph W.	Car Laborer	May 24, 1960
15. Fletcher, Louise	Clerical	January—, 1961
16. Lundy, E. P.	Car Laborer	May 24, 1960
17. Gibson, Moran	Car Laborer	May 24, 1960
18. Davidson, Raymond S.	Call Boy—Extra	Not Shown
19. Carter, Donald Ray	Car Laborer	May 24, 1960
20. Stratton, Ray	Car Laborer	December 30, 1960
21. Wade, R. E.	Car Laborer	December 30, 1960
22. Phillips, Paul H.	Car Laborer	May 24, 1960
23. Jones, W. H., Jr.	Janitor	December 30, 1960
24. Bush, Elmo	Pipe Fitter Apprentice	December 31, 1960
25. Holt, W. H.	Car Foreman	July 12, 1961
26. Wells, O. F.	Car Laborer	May 24, 1960

27. Honeycutt, W. M.	Blacksmith	December 31, 1960
28. Clark, Fred M.	Car Laborer	May 24, 1960
29. Marrs, John S.	Car Laborer	May 24, 1960
30. Lane, R. E.	Car Laborer	December 30, 1960
31. Wells, R. J.	Car Laborer	December 28, 1960
32. Watts, M. D.	Car Laborer	December 30, 1960
33. Lane, F. L.	Section Laborer	May 23, 1960
34. Johnson, William H., Jr.	Clerical	January 9, 1961
35. Coward, Jack	Shop Laborer	December 31, 1960
36. Wampler, Kyle	Call Boy and Clerical	January 9, 1961
37. Fletcher, Beldon	Section Laborer	January 6, 1961
38. Field, William H.	Clerk and Janitor	January 16, 1961
39. Frazier, Mesby	Car Laborer	May 24, 1960
40. Livesay, Lloyd	Section Laborer	January 12, 1961
41. Seale, R. C.	Machinist	December 30, 1960
42. Body, Paul H.	Welderman	May 23, 1960
43. Cooper, F. E.	Electrician	December 31, 1960
44. Luntsford, June	Clerical	January 9, 1961
45. McCormack, D. G.	Machinist	December 31, 1960

2. Remaining Plaintiffs in the "RLEA" Case:

1. Bledsoe, Willie E.	Section Laborer	June 30, 1961
2. Laney, Cecil R.	Section Laborer	January 9, 1961
3. Fletcher, Charles B.	Section Laborer	January 9, 1961
4. Collins, Earl A.	Section Laborer	January 3, 1961
5. Adams, Elmer D.	Section Laborer	May 23, 1960
6. Jarrett, Billy	Section Laborer	May 23, 1960
7. Creech, Robert L.	Section Laborer	May 23, 1960

The many plaintiffs have filed affidavits and statements from employers showing amounts earned, etc. from outside sources. These same figures in condensed form have been supplied by Counsel for plaintiffs and appear in the papers, although not filed as exhibits nor as evidence. For that reason the original papers will not accompany this report. There has developed no controversy as to the amount of average monthly pay and credits to be applied for each employee who is a plaintiff herein.

FACTS FROM THE RECORD AS DETERMINED BY THE SPECIAL MASTER

On June 12, 1959, the Southern Railway Company filed proceedings under Title 49 U. S. C. A., Section 5 (2), with the Interstate Commerce Commission requesting authority to buy and acquire all the issued and outstanding capital stock of the Interstate Railroad Company, various parties intervened in this proceeding, the two intervenors with which we are concerned are the Railway Labor Executives' Association and the Louisville and Nashville Railroad Company. The "RLEA" intervened for the primary purpose of protecting the interest of its members—employees of the Interstate Railroad Company. The Louisville and Nashville Railroad Company filed its petition on August 13, 1959, opposing the acquisition of the Interstate Railroad Company by the Southern Railway Company desiring the acquisition thereof for the Louisville and Nashville Railroad Company.

Proceedings and hearings were had in this manner before the Interstate Commerce Commission Examiner, John L Bradford, and on October 6, 1960, his report was served upon the parties, which report recommended the sale of all the capital stock of Interstate Railroad Company to the Southern Railway Company, but with certain conditions among which is the condition for the protection of the railway labor of Interstate Railway Company, as imposed in the "New Orleans Union Passenger Terminal Case". (Exhibit No. D, Case No. 976. supra.)

Prior to the date of the Examiner's Report, namely, on April 25, 1960, an agreement was reached between the Interstate Railroad Company, the Southern Railway Company and the Louisville and Nashville Railroad Company,

giving the Louisville and Nashville Railroad Company certain rights (immaterial here) between Dorchester Junction on the Interstate and Louisville and Nashville Railway and Miller Yard at the terminus of the Interstate on the Clinchfield Railroad. After this agreement the Louisville and Nashville Railroad Company requested permission to withdraw its intervening petition.

On February 16, 1961, the first order of the Interstate Commerce Commission was entered which approved the report of Examiner, Bradford, and dismissed the intervening petition of Louisville and Nashville Railroad Company.

On March 9, 1961, the "RLEA" filed its petition for reconsideration and modification of the said report of the Examiner and of the order approving the same. The "RLEA" sought to obtain for the employees of Interstate Railroad Company protection other than that allowed by the Commission.

By order of the Interstate Commerce Commission entered on May 17, 1961, the petition of "RLEA" was dismissed and the order of February 16, 1961, was made effective twenty (20) days from May 17, 1961, or June 6, 1961.

John L. Bradford, the hearing Examiner, in this report which was served on October 6, 1960 (Exhibits No. 5, see also Exhibits 1, 2, 3 and 4 which are the records of the hearing before the Examiner), starting on page 3 of said report, gives a detailed description of the Interstate Railroad Company and its various problems. It is not necessary to report in full the Examiner's

findings. However, they are in evidence and I adopt the same as a part of my findings of fact. On page 5, 6 and 7 of the Examiner's Report and from evidence introduced before the Special Master, it will be seen that the Interstate Railroad Company has a fleet of about 3000 old 50 tons capacity coal cars, and that the expense of maintaining them is rapidly increasing; that its operating revenues from coal traffic does not by itself justify even a fleet of 3000 cars, although it needs 6000 cars to supply its shippers of coal, and during the past five years, it has depended upon other railroads to supply these extra needed cars, primarily the Southern Railroad Company. However, it presently (1959) has net income only as a result of a net balance in per diem payments, and the rate of retirement of these cars is increasing and they are too small and too old to warrant rebuilding.

It appears from the evidence that the trend in modern railroading is to the larger cars, 70, 90 100 and even larger cars. It is a matter of economy to the railroad and the user of the product shipped. There is evidence that the 70 tons car could be built in the Andover shops of the Interstate with some change in the shop equipment. The shop is not equipped to build a car larger than 70 tons. No car larger than a 50 ton car has ever been built in this shop at Andover. There is evidence that building of a 70 ton car has been under consideration, but no final action had been taken on the matter. The facts show that the big users of coal want the 100 ton cars loaded so that they may have fewer cars to handle and dump and also the advantage of a cheaper freight rate. There is no question but that the small 50 ton car is obsolescent (except for some small amount of domestic coal trade), not only because of its lack

of capacity, but also because of its lack of strength and construction to withstand the long modern trains now in use since the advent of the diesel locomotives.

The Interstate Railroad Company has been for about five years prior to the filing of the petition by Southern depending upon a large supply of cars from other railroads to meet its needs, primarily from the Southern, and the only evidence before me is that Southern would continue to furnish the cars needed by Interstate even if acquisition were denied to Southern. So with heavy repairs stopped and cars of other railroads being available for use there was no need for many car repairmen, and even if the petition of Southern had been denied there would have been no definite known change in the policy of Interstate that would have resulted in more employment in the departments other than maintenance of ways.

We find in the report of Examiner, Bradford, substantiated by evidence before the Special Master, that the Interstate "recently" reduced its employees by about 30 as a result of retiring old worn out cars, discontinuing heavy repairs and effecting internal economies in various departments. (The approximately 30 employees "recently" cut off are those discharged or furloughed from the period of May 23, 1960 until the list in December 1960 to be furloughed. The report of the Examiner and the order of the Interstate Commerce Commission did not provide for these recently cut off employees. The Examiner knew (during the hearing) and found that these employees had nothing to do and there was nothing upon which they could perform labor.) They were surplus employees and no longer needed unless a program for building cars at the Andover, Virgin-

ia shops was reintsated. The decision of whether to buy, build, rent or do nothing is a decision of policy for management and not for the Court. No definite decision has been reached.

The findings of the Examiner and the evidence before the Special Master discloses that these employees (other than maintenance of ways and structures employees) were furloughed because heavy repairs were discontinued in May and December, 1960, and the actual introduction of new devices and machines in the shops and office. It is to be noted that these employees, except for (W. H. Holt) have been furloughed and they still retain their seniority rights and are subject to recall. Some have been recalled for part time work. This is nothing new in the history of the interstate Railroad Company's employees. The work record (Exhibit 6) shows that being furloughed in the past from time to time has been a part of the employment record.

It appears in evidence that after the acquisition of Interstate by Southern, several of the Interstate cars which had been side-tracked because they required heavy repairs, were taken to the Southern shops in Knoxville, Tennessee for an experiment attempting to determine if the prior decision by Interstate Railroad Company to stop heavy repairs on these cars was justified. After servicing these cars, officials of Southern were convinced that the decision of Interstate was justified and no more of these cars have received repairs. The remainder of these set out cars are yet on the side tracks of Interstate. These repaired cars are the cars referred to in the evidence as having been painted "red" and carrying the letter "K" thereon. I find nothing inconsistent with the employment situation because of this ex-

periment on these cars. Should Southern have continued to do repairs on these cars, the situation regarding employment might be different.

It is to be noted that all these plaintiffs (except Willie E. Bledsoe and Cecil Laney) were furloughed prior to the effective date (June 6, 1961) of the order of the Interstate Commerce Commission, even prior to the first order of the Commission on February 16, 1961 approving the report of Examiner, Bradford. Each was furloughed by the Interstate Railroad Company and not by the Southern Railway Company, the defendant in these cases. Even though it is suggested and inferred by the Plaintiffs that the Interstate was acting upon the advice and direction of the Southern Railway Company in furloughing these employees, I fail to find any evidence supporting that assertion Neither do I find that the action of Interstate was done in anticipation of the acquisition by Southern Railway Company of the capital stock of the Interstate Railroad Company. The lists naming those to be furloughed were made by Mr. H. L. Stuart, Assistant to the President and approved by Mr. A. L. Holton, President of the Interstate Railroad Company, and both deny any action by Southern Railway Company influencing their decisions. It is true that Mr. Holton thought too many men were being furloughed at that time, but he approved the action of Mr. Stuart.

One of the plaintiffs, namely W. H. Holt, was *discharged* on July 12, 1961, and after the date of the acquisition. This plaintiff commenced working for the Interstate in 1933, and worked himself up to the job of car foreman and his place of duty was in the yards at Norton, Virginia. While his discharge is after the effective date of the acquisition, it is not as a result of the transaction. It appears

that he was discharged for drinking intoxicants during working hours. He denies this charge, but never attempted to follow up his dismissal with management. It therefore appears that he was discharged for cause and is not entitled to consideration for any of the benefits provided for in said order. (Record—evidence of W. H. Holt pages 347-351 and also evidence of H. L. Stuart.)

The Interstate Commerce Commission Examiner found that certain shop employees of Interstate Railroad Company would be adversely affected *"if"* heavy repairs were removed from the Andover shop to the Southern shops at Knoxville. Except for the one experiment, supra, no heavy repairs were done at the Knoxville Shops. On the contrary, heavy repairs on Interstate cars was discontinued and there is no evidence that it ever has been resumed either at Andover or Knoxville shops on the Interstate cars. The one experiment might well have been for the benefit of these employees had heavy repairs proved justified, but unfortunately for them, it proved otherwise. However, I find that the Southern should not be penalized for its experiment in this matter.

On April 9, 1963, there was filed a list of seven interrogatories. These are filed among the papers herein and are also set out in full on pages 17-19 on the Plaintiff's Reply Brief. The defendant filed its objections to said interrogatories in Court on the 17th day of April, 1963. I fail to find any order requiring the defendant to answer the interrogatories. This was brought to the attention of the Special Master during the hearings, and I was of the opinion that it was a matter for the Judge and not for the Master, Notwithstanding that, the plaintiffs have not sought the ruling of the Judge. Now, the defendant in its reply

brief, page 18, requests the Special Master to rule on whether or not it should answer any of the interrogatories. At this time, I do not believe anything can be added that would be material to the issue. The plaintiff used two witnesses, a Mr. Willingham and a Mr. Hensley under the rules of cross-examination, and both testified in substance that no heavy repairs have or are being sent to the Southern to be done, except the one time which is admitted by the defendant and in its briefs. The plaintiff is not justified in relying upon the proposition that there is a presumption against the defendant because of its failure to answer the interrogatories. As pointed out above, it filed its objection to the interrogatories and the matter had never been passed upon. Furthermore, the plaintiffs had the right to request subpoenas for any of the Southern employees and records. They made no such request.

Another plaintiff, Raymond S. Davidson is not entitled to any consideration for any of the benefits provided for in said order. The employment record does not show a date of discharge for him. He was used only as an extra call-boy, which was work given him at odd times while he was in college at Clinch Valley College, a Division of the University of Virginia at Wise, Virginia. this was in the nature of a favor to him and he established no rights as an employee of the Interstate Railroad Company.

During the year 1960 new office machines were installed, these having been purchased by the Interstate Railway Company, and prior to the acquisition. These machines together with other internal office economies put into practice by management of Interstate Railroad Company resulted in the loss of certain jobs in and about the offices and it followed that employees with greater seniority got the jobs

and those with less were furloughed. I find no connection whatsoever between this action and the acquisition of Interstate by Southern.

However, after the acquisition of the capital stock of Interstate by Southern the functions of the accounting department of the Interstate at Andover, Virginia, were transferred to Atlanta, Georgia and into the offices of the Southern, affecting sixteen (16) jobs and thirty-four (34) employees. None of these thirty-four employees are Plaintiffs in either of these cases and all have or are being paid by Southern according to the order of the Interstate Commerce Commission (Record p. 469 &c.)

MAINTENANCE OF WAYS AND STRUCTURES EMPLOYEES

There are twelve (12) employees in the category of Maintenance of Ways and Structures Employees, five (5) of these are plaintiffs in the "Swacker" case and seven (7) in the "RLEA" case. Some of these employees were cut off in May, 1960 and others in January, 1961, and all before the acquisition of Interstate by the Southern, except Willie E. Bledsoe and Cecil R. Laney who were furloughed in June, 1961.

It appears there has been seasonal cut-offs of these maintenance of ways employees in past years. While there is some evidence that these men were furloughed because of the introduction of machinery and equipment used in maintenance of its tracks, but an examination of the record shows there was very little equipment owned by Interstate prior to date of the acquisition.

In 1960 some two or three vehicle trucks were bought to replace the section rail cars. This made transportation for the men some faster and more convenient. Prior to 1960 the Interstate had all these same employees when and after which aided the workmen and saved considerable time. But the Interstate had purchased several items of power tools it acquired the power tools and no furloughing was done. It bought the power tools on the advent of the diesel locomotive, since there were no clinkers available for ballast and stone had to be used which was easier to handle with power tools.

The work record shows that these employees have experienced cut-off periods in prior years and then called back. I find that the Plaintiffs who are maintenance of way employees would have been called back for work (and some have been from time to time since January, 1961), except for the fact that the Southern Railway Company has available and the Interstate is and has been using, since the effective date of the acquisition, track maintenance equipment which when used replaced these employees. The Interstate prior to date of acquisition by Southern had none of this equipment. At one time in the "early fifties" it had rented from Kershaw Company certain machinery. The Interstate never purchased any one of these machines until after the date of its acquisition by Southern, namely on July 4, 1961 it received delivery of a smoothing machine and except for this purchase and the Southern providing some equipment (on a rental basis), the Interstate would still be maintaining its tracks and ways by labor and the same power tools it used prior to June 6, 1961, the date of the acquisition. The tracks and ways must be maintained for there is no substitute for keeping the tracks suitable for

the traffic. These maintenance of ways employees are yet partly unemployed because of those internal technological improvements brought about by the Interstate and Southern prior to and subsequent to acquisition, and as a result fewer men are needed, and for a much shorter time than was previously required. No work has been removed from Interstate lines, but same mileage of track is being maintained with these machines and fewer men.

I do not find that these maintenance of ways employees were furloughed in anticipation of the acquisition. The evidence is that they were not.

LAW

The Interstate Commerce Commission in prescribing the protective conditions for the employees of Interstate Railroad Company did so pursuant to Interstate Commerce Act, 49 *U. S. C. A. Section* 5 (2) (*f*) which provides:

> "As a condition to its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order, such transaction *will not result* in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection af-

forded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

There is no question or contention by either party but that the Interstate Commerce Commission acting under the aforesaid Act of Congress had the authority to issue the protective provisions set forth in its order approving the acquisition. Since this point is not at issue in these cases, no cases will be cited and no authorities need be mentioned.

The Commission prescribed the protective conditions imposed in the *New Orleans Union Passenger Terminal Case*. 282 I. C. C. 271, and "Exhibit D" in Case 976, supra, which applies the terms of the *Washington Agreement of May* 21, 1936, "Exhibit E" in Case 976, supra, but subject to the limitations set out in the New Orleans Case.

The foregoing Section 5 (2) (f) states ". . . . . *will not result. . . .*" Also in the protective provisions in the New Orleans and Oklahoma Cases and the Washington Agreement of May, 1936, we find therein the wording *"If as a result of . . . ."* the employees are put in a worse position or are displaced, etc.

In the case of "RLEA" v. United States, 339 U. S. 142, 70 S. Ct. 530, and also all other cases cited in the brief of Plaintiffs, it will be noted that the employees in each lost their jobs *after* the effective dates of the merger, and all being subsequent were held to be a result of the transaction. The protective conditions prescribed by the Commission in the present matter provide, *"If as a result, . . ."* then certain payments are to be made. No cases have been cited and I do not find any wherein the complaining employee was dismissed or put in a worse position by the railroad being absorbed prior to the date of the acquisition.

Section 12 *of the Washington Agreement of* 1936 contains a provision for the protection of employees who have been rearranged or adjusted in anticipation of a coordination with the purpose of depriving an employee of benefits to which he would be entitled under that agreement as an employee immediately affected by a coordination, and in such an event the agreement applied to that employee as of the date he is so effected. But as stated above in my findings of facts, the evidence does not support any such action in anticipation of the coordination. Neither do I find that the Interstate Railroad Company was a party to this Washington Agreement.

The Courts and the Interstate Commerce Commission never intended that a railroad should be burdened with a surplus of employees even after unification of control when subsequent internal technological improvements come about in the normal cause of events and because of scientific research and development.

In the United States District Court for the Southern District of Florida in *In Re Florida East Coast Railway Company,* 171 F. Supp. 512 (1959), the Court affirmed in substance the foregoing.

As to just what the Interstate Commerce Commission means when it imposed the New Orleans Conditions, we have its own interpretation thereof in the recent report of the Commission dated June 10, 1963, in *Southern Railway Company . . . Control . . . Central of Georgia,* which report is attached hereto as a part of this report. The Commission said:

> "Obviously, if an employee is dismissed or displaced for reasons not connected with the transaction, he is not entitled to the benefit of the conditions. Before an employee is entitled to such benefits, there must be a reasonably direct causal relation between the transaction and the injury sustained: in other words, the transaction must be the proximate cause of the injury."
>
> "However the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too direct and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions."

This same matter has now been heard by a three Judge Court in the Eastern District of Virginia and decided January 31, 1964, styled "RLEA" V. United States, et al

—Civil Action No. 3004, the opinion and order of which are attached to this report.

In this case the Interstate Commerce Commission has said what it means by certain of the provisions embodied in the "New Orleans" conditions. It said:

> "We may not by interpretation narrow the scope of the protection intended by the statute. . . . Questions as to whether adverse effects suffered by particular employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular causes and must be left for the determination of the arbitrators in case of dispute."

Upon reconsideration the Commission, in its report of June 10, 1963, said:

> "It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of (Southern) and Central or by the shifting of functions from one to the other. However, the 'effect' of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and *it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.*"

The three Judge Court affirmed this interpretation by the Commission.

For the reasons hereinbefore, stated, I find and report to the Court:

1. That the Plaintiffs in the "Swacker" Case and in the "D. G. McCormack" Case have not been furloughed, discharged nor placed in a worse position because of the acquisition of the Interstate by the Southern, nor in anticipation thereof, and that the complaint filed by each of them should be dismissed.

2. That the Plaintiffs in the "RLEA" Case have not been furloughed, discharged nor placed in a worse position because of, nor in anticipation of the acquisition of the Interstate by the Southern, and the complaint filed by each of them should be dismissed.

Dated this 27 day of March, 1964, at Wise, Virginia.

CARL W. HAMILTON
SPECIAL MASTER

APPENDIX B

THE REPORT OF THE SPECIAL MASTER, CARL W. HAMILTON, DATED DECEMBER 4, 1964:

By Order entered in the above consolidated causes on May 27, 1964, they were re-referred to the undersigned Special Master for his further consideration and report on them.

This same Order further provides that Defendants answer by June 20, 1964, the additional interrogatories filed

herein on May 12, 1964, and by Order entered on July 6, 1964, the time for filing answers to the interrogatories was extended to and including the 20th day of July, 1964.

By agreement, a hearing was conducted on July 25, 1964, before the Special Master, at which time and place additional evidence was introduced. The proceeding and evidence on that date were taken and transcribed by Evelyn D. Slemp, and the transcript thereof consisting of thirty-four (34) pages and one exhibit consisting of several photographs is filed with this report.

MAINTENANCE OF WAYS AND STRUCTURE EMPLOYEES

Mr. R. C. Shannon of counsel for R. L. E. A. has advised the Special Master by telephone that there will be no new nor additional evidence touching upon the maintenance of ways and structures employees.

Upon *reconsideration* and study, the various briefs filed and a review of the law in this matter, the Special Master is still of the opinion:

(a) That none of those employees were furloughed in anticipation of the acquisition of Interstate's stock by Southern.

(b) That none of this work has been removed or shifted from the Interstate lines, and that no jobs in this category has been transferred elsewhere.

(c) That the same track mileage, bridges and structures and at the same locations are being maintained with fewer men.

(d) That fewer men and jobs are needed both prior to and subsequent to the date of acquisition, because of new machines and devices acquired and rented by Interstate. These mechanical and technological improvements were evident even had there been no acquisition. Modern railroading cannot be confined to the pick and shovel methods. The loss of jobs in the maintenance of railroad lines because of mechanical and technical improvements is as inevitable as a like result from automation in manufacturing. The I. C. C. in its own explanation of its conditions in the Southern-Central of Georgia case negatives any idea that it meant to promulgate a plan of keeping all employees, regardless of their usefulness.

(e) That no employees of Interstate in this category have been furloughed, lost their jobs or placed in a worse position as a result of the transaction between Southern and Interstate. The Plaintiffs have failed to demonstrate anything to the contrary.

In the pending case of Southern-Control-Interstate, the I. C. C. in its "Report of the Commission", dated February 16, 1961, on pages 5 and 6 of said report, and quoting from the Erie R. Co. Merger case, in the U. S. District Court, Eastern District of Michigan, wherein the R. L. E. A. wanted more protection for employees, says:

> "The decision of this Court. . . . A requirement that carriers retain employees following mergers would sterilize provisions of the Act which is designed to promote economy *partially through the reduction of personnel.* It seems that if Congress had intended such a result it could have said so in unequivocal language."

There seems to be a lack of agreement as to what has been decided by the I. C. C. and the Court in the following case and my analysis of the same follows:

RAIL LABOR EXECUTIVES' ASSOCIATION, et al
Plaintiff

V. CIVIL ACTION NO. 3004

UNITED STATES OF AMERICA, et als
Defendants

An action by R. L. E. A. in the U. S. District Court for the Eastern District of Virginia, to enjoin, set aside and annul the Reports and Orders of I. C. C. entered on November 7, 1962, December 3, 1962, and June 10, 1963, in the proceeding of "Southern Railway-Control-Central of Georgia Railway Company, Finance Docket No. 21400."

The R. L. E. A. charges that the conditions imposed by the I. C. C. fall short of what is required by Section 5 (2) (f) of the Interstate Commerce Act, and lack fairness and equity.

The Court in this case by affirming the I. C. C. held, inter alia:

(a) The I. C. C. is free in its discretion to impose different conditions predicated upon its own evaluation of the facts, so long as it meets the minimum statutory criteria, and is fair and equitable.

(b) That as a matter of law, certain adverse effects attributable to internal technological improvements create no liability under Section 5 (2) (f).

(c) That the I. C. C. could clarify what it meant by certain of its conditions.

(d) That a provision of arbitrators for unsettled disputes resulting from the transaction in this particular case was plainly right. (There is no such condition is the Southern-Interstate case.)

The I. C. C. in its report of June 10, 1963, being upon reconsideration said:

> "It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a *coordination* of the operation of (Southern) and Central or by the *shifting of functions* from one to the other. However, the 'effect' of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefits of the conditions."

The foregoing case arose because of the Reports and Orders of I. C. C. dated November 7, 1962, and June 10, 1963. After the report and order of the I. C. C. on November 7, 1962, the Southern and Central jointly filed a petition for further consideration and *clarification* of the conditions imposed for the benefit of employees, and to eliminate certain alleged ambiguities therein.

The I. C. C. in its report and order agreed that there is merit in the "carriers plea" that the I. C. C. clarify its intentions as to the general scope of the protection intended to be afforded. The I. C. C. in its aim to clarify says in its Report of June 10, 1963:

On page 4—"Obviously if an employee is dismissed or displaced for reasons not connected with the transaction, he is not entitled to the benefit of the conditions. Before an employee is entitled to such benefits, there must be a reasonably direct causal relation between the transaction and the injury sustained; in other words, the transaction must be the proximate cause of the injury."

On page 9—"No modification of the language of those conditions is deemed necessary, but they should be construed by affected parties and *arbitrators* in the light of our foregoing remarks."

On page 7—"The conditions . . . are not limited in their application to persons who may be in a pay status on the date the transaction is consummated. If a person possesses the status of employee of either carrier when the transaction is consummated, he is entitled to the potection afforded by the conditions, *provided he demonstrates* that he has been deprived of employment or displaced as a result of or in anticipation of the transaction."

While not explicitly so stated, it seems to be a contention of the Plaintiffs throughout that no employee actively employed on the date of filing of the application by Southern with the I. C. C. could be deprived of employment or placed in a worse position because of the transaction, or because of any program of economics resulting from the transaction.

The I. C. C. at page 15 of its report dated November 7, 1962, rejected the "attrition" rule condition and clarified what it had in mind by saying:

". . . conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

Also, on page 16 of this same report of November 7, 1962, are some quotations from the Presidential Railroad Commission in its report of February 1962, in which it voiced objection to a plan of keeping all present employees, regardless of their usefulness.

Also on page 21-22 of its report of November 7, 1962, the I. C. C. says that it "by interpretation cannot narrow the scope of the protection intended by the statute."

". . . . Questions as to whether adverse effects suffered by particular employees in their employment result from the transaction are *questions of fact* which can be determined under the circumstances of particular cases. . . ."

EMPLOYEES OTHER THAN MAINTENANCE OF WAYS AND STRUCTURES

It now appears that Counsel for the plaintiffs have produced through interrogatories and the answers thereto, some new and pertinent evidence, which if it had been in the record before the Special Master's first report was filed, his findings as to certain employees would have been different. Therefore, upon consideration of these newly developed facts, I find and report unto the Court the follow-

ing, and in any instance where this second report is inconsistent or in conflict with the first report, the provisions of this second report will prevail:

IS THIS A CO-ORDINATION WITHIN THE WASHINGTON AGREEMENT?

The plaintiffs contend that the transaction between Southern and Interstate is a co-ordination within the meaning of the Washington Agreement of May 1936. On page 20 of my first report I found and reported—"the evidence does not support any such action in anticipation of the co-ordination". I would clarify and broaden that statement to say—the evidence does not support any such action in anticipation of a co-ordination, and neither do I find any evidence before me or any finding by the I. C. C. that there was a co-ordination.

I have studied with care upon reconsideration, the Washington Agreement, and especially the part thereof pointed out by the plaintiffs in one of their briefs starting on page 5 thereof.

In Section 1 of the Washington Agreement, it is pointed out that the—"purpose of this agreement is to provide for allowances to defined employees *affected by co-ordination* as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry *solely due to and resulting from such co-ordination.* Therefore the parties hereto understand and agree that fluctuations, rises and falls and changes in volume or character of employment brought about *solely* by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement."

In Section 2 (a) of this agreement the term co-ordination is defined to mean—"joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

In the report of the I. C. C. which was decided February 16, 1961, and in its order of the same date and who in its final order, after reconsideration, dated May 17, 1961, the I. C. C. does not decide, mention or hold that the Southern —Interstate matter is a co-ordination, consolidation, merger or unification. Throughout its findings, report and orders the matter is referred to as an acquisition by Southern of Direct Control of Interstate through ownership of 100 per cent of the capital stock of Interstate.

By no stretch of the imagination can it be said that Interstate lost its identity as a separate corporate entity. It is yet a separate corporation operating under its own name, and as subject to all the rules and regulations of the I. C. C. applicable to railroads. The change is in the ownership of its capital stock which is now owned by Southern. There has been no unification, consolidation or merger. Those terms by their own definition mean a loss of identity, as by the issuance of stock of the controlling corporation to replace that of the corporation being absorbed. This did not take place. Counsel for plaintiffs fail to distinguish between the terms, merger, unification and consolidation, and purchase of the outstanding stock by one corporation in another thereby creating a wholly owned subsidiary. There has been no co-ordination as defined by the Washington Agreement.

In the New Orleans Case, it is said—"the Washington Agreement, subject to the limitations *later shown,* would provide the fair and equitable arrangement contemplated by the Statute."

The limitations *"later shown"* are:

(a) The allowance to an employee entitled thereto shall be reduced to the extent of combined monthly earnings in other employment and unemployment insurance benefits.

(b) The minimum to be paid and those entitled thereto shall be as provided by conditions 4 to 9 inclusive, in the Oklahoma Ry. Co. Case.

It seems that the intent and effect of the provisions of the New Orleans case are that all employees adversely affected by the transaction involved should receive the protection afforded by the Washington Agreement, reduced to the extent that they receive compensation in other employment or under employment insurance laws, and that employees adversely affected prior to June 6, 1965 (being 4 years from the effective date of the order approving the transaction) are to receive as a minimum the protection afforded by the Oklahoma Conditions as prescribed in 4 to 9, inclusive for the period they are adversely affected prior to June 6, 1965, but if the total amount of such compensation is less than they would receive under the Washington Agreement, as limited, applied from the date of adverse affect, then they are entitled to the remaining benefits they would have enjoyed under the Washington Agreement.

The New Orleans Case provisions were designed for a "transaction" and not a "co-ordination."

The I. C. C. should set out such benefits as it requires rather than the involved method of incorporation and reference and it would be much more intelligible.

There is no pooling of equipment. It is true that Interstate has been short of cars and has been using Southern cars and cars of other railroads for a long time prior to this transaction.

In answers to the seven interrogatories asked on May 8, 1964, it appears that Interstate purchased from David J. Joseph Company of Mountain Brook, Alabama, a dealer in second-hand railroad equipment, 336 coal cars of 50 ton capacity, and that delivery thereof commenced in November 1963; that those cars were formerly owned by Clinchfield Railroad Company and *"during the course of arranging for the purchase of these cars and the building of them to useable type by an independent company, Frieze Enterprises of Charlotte, North Carolina . . ." "The work by Frieze Enterprises was to be paid for by Interstate." ". . . Interstate has a bill of sale for the cars from the Joseph Company and Interstate paid for the work done to the cars from the Joseph Company and Interstate paid for the work done to the cars by Frieze Enterprises."* (Under-scoring is by Special Master—the quote is from Answers filed July 25, 1964.) This is work that could have been done in the Interstate's Andover shop and by the furloughed employees. This is work diverted from the Interstate.

In additional Answers filed on August 26, 1964, it appears that discontinued cars of Interstate were scrapped by two separate independent companies and that part of

the salvage—*"truck frames and balsters were salvaged for Interstate use."* The Interstate shop and its employees were capable of doing this work and it must be considered as diverted from Interstate. Those old worn out cars were on Interstate side tracks and had to be removed to the place of business of David Weatherspoon and away from the Interstate shop. There is no established date as to when this work began.

In Answers to the interrogatories filed on May 12, 1964, it appears that during the six months period prior to the date of acquisition, Interstate used 2713 Southern cars of which 1805 were the 100 ton aluminum cars; and that during the six months period after date of acquisition it used 7752 Southern cars of which 1568 were of the 100 tons capacity.

It also appears that from the date of acquisition (June 6, 1961) to June 1964, there has been taken out of service because of wrecks, unserviceable, etc., 1094 Interstate cars; which substantiates the poor condition of Interstate's equipment. Thus, those were 1094 cars cut down and to be cut down and which is being done at a place other than Interstate shop.

On July, 23, 1964, Plaintiff's Counsel filed additional interrogatories, and the Special Master directed the same be answered. Counsel for Plaintiffs stipulated (Record Page 32) that questions One (1) through Seven (7) have been answered in the paper filed on July 25, 1964 entitled *"Purchase of Former Clinchfield Cars"*. On August 26, 1964, Defendant's answers to the remaining questions Eight (8) through Seventeen (17) were filed with the Special Master.

This evidence further shows that the Interstate fleet of cars is fast becoming unserviceable and management is confronted with the problem of renting, building or buying cars. It decided to purchase 336 of the type shown in photo No. 8 Exhibit No. 1 in the evidence taken on July 25. 1964 (being Interstate Car No. 9404) used and rebuilt cars. As heretofore stated I believe this decision was for management and not for the Court.

As appears from interrogatories filed on September 14, 1964, September 24, 1964 and Eight (8) interrogatories propounded by the Special Master under date of September 24, 1964, and the answers filed thereto, that the capacity of these cars is being increased by six to eleven tons. This work of increasing the capacity is being done by Frieze Enterprises at Charlotte, North Carolina. About Twenty (20) of these cars have been increased in capacity as of September 25, 1964, and more are to receive the same capacity increase. This is extra work on the cars performed by a firm other than David J. Joseph Company of Mountain Brook, Alabama, from whom the cars were purchased. Furthermore, the cost of this capacity increase is in addition to the original purchase price for these cars.

Attached hereto is a photograph of Interstate Car No. 9658 (not introduced by either party, included by the Master), which shows the increase in height of this car when contrasted with the height of Interstate Car No. 9404, Exhibit No. 1. It is apparent that this increased capacity is simple metal work that could have been performed in the Andover Shop of Interstate and by the employees who are now on furlough, but instead this work was diverted and is being currently diverted to Frieze Enterprises.

As hereafter pointed out, when 467 other Interstate cars were repaired and repainted in Southern's Koster Shop at Knoxville, the theory of an experiment, and the idea of running repairs were exceeded.

All cars of other railroads including Southern are on a per diem basis and at the rates of rental fixed for all railroads. These cars are not furnished free of cost. This per diem charge is paid by Interstate to Southern the same as to other railroads. Proper records of per diem charges are kept and the amounts payable or receivable by each, is shown. The contention of Counsel for Plaintiffs that no money passes is unsound. As is generally true in transactions between a parent company and its wholly owned subsidiary, actual payment is not necessarily made at any given time or periods, but the Southern and Interstate do settle their balances *"as the need arises"*, (Record Page 107). The fact that the interchange is not physically made at the time of arrival of cars is insignificant to the issue, since the dates for calculating wheelage is recorded. Interchange tracks are maintained at Appalachia and Andover, Virginia. As heretofore found, there are separate corporate entities and each must satisfy the requirements of I. C. C. and other agencies of the United States Government.

It has been pointed out by Counsel of each side that the Special Master was in error as to certain facts in his first report and on Page 12 thereof wherein he stated . . . ". . . . several of the Interstate cars which has been sidetracked because they required heavy repairs, were taken to the Southern shops in Knoxville, Tennessee. . . ."

It appears that this statement of facts was in error and the full paragraph consisting of Fifteen (15) lines is stricken from the said report and in lieu thereof the following finding are substituted:

It appears from the evidence that prior to the date of acquisition of the capital stock of Interstate by Southern, officials of Interstate had discontinued making heavy repairs on its cars; that when a car needed heavy repairs, it was removed from service and placed upon a side-track. After the acquisition, the evidence first introduced in this hearing disclosed that one hundred (100) or less, Interstate cars were diverted into the Southern shops in Knoxville, Tennessee for the purpose of conducting an experiment and in an attempt to determine if the prior decision by Interstate officials to stop heavy repairs on its cars was justified. These repaired cars are the cars referred to in evidence as having been painted red and carry the letter "K" thereon (Transcript of Evidence Page 70, etc.). This same evidence disclosed that when these cars were run through the shop, then they (Southern) quit because the material wasn't there to start with. At the conclusion of that evidence, I found nothing inconsistent with the employment situation because of these particular cars and I so stated, and I further stated: "Should Southern have continued to do repairs on these cars the situation regarding employment might be different".

Upon rehearing in this case, the evidence now discloses through answers to the interrogatories that rather than 100 or less cars, there have been diverted through the Knoxville shops, 467 of these cars for repairs. This number out of the supply of cars owned by the Interstate (about 2000

Interstate cars in service and it seems that repairs on such a number has passed the state of an experiment. Light repairs on these cars is stated by Mr. Stuart on Page 39 of Evidence No. 2—Case No. 976. Thus it was not running repairs. Of the 467 cars diverted to the Knoxville shops, 392 are yet in service, 5 have been set out and require heavy repairs, and the remaining 70 have been retired and scrapped.

To repair and paint 467 cars even in the manner described on Page 70, etc. of the evidence represents a considerable amount of work and man hours and is work that was diverted from the Interstate shop at Andover, Virginia, after the acquisition, and is work that properly belonged in the Interstate's Andover, Virginia shops. No dates have been established within which this work was done.

Upon reconsideration of the evidence heretofore had the interrogatories and answers thereto, and the new evidence taken on July 25, 1964, I fail to find anything which would justify any revision of my prior finding in favor of the Defendant in so far as the following Plaintiffs are concerned:

EMPLOYEES	JOB CLASSIFICATION
1. Flores, Coy	Boiler Fireman
2. Holbrook, Curtis	Section Laborer
3. Kindle, Glenn C.	Section Laborer
4. Fletcher, Louise	Clerical
5. Davidson, Raymond S.	Call Boy—Extra
6. Jones, W. M., Jr.	Janitor

EMPLOYEES	JOB CLASSIFICATION
7. Bush, Elmo	Pipe Fitter Apprentice
8. Holt, W. H.	Car Foreman
9. Lane, F. L.	Section Laborer
10. Johnson, W. H., Jr.	Clerical
11. Coward, Jack	Shop Laborer
12. Wampler, Kyle	Call Boy and Clerical
13. Fletcher, Beldon	Section Laborer
14. Field, William H.	Clerk and Janitor
15. Livesay, Lloyd	Section Laborer
16. Cooper, F. E.	Electrician
17. Luntsford, June	Clerical

The Plaintiffs G. M. Frazier, Milford V. Johnson and Ralph W. Slagle are denied any benefits hereunder even though they are in the craft of car laborers, for the reasons that Frazier and Slagle were employed at Norton, Virginia, and Johnson at Miller Yards, each several miles removed from the Andover shops at Andover, Virginia, and they were not employed in car repair work at the Andover shop.

As for the following Plaintiffs named:

EMPLOYEES	JOB CLASSIFICATION
1. Swacker, Frank L., Jr.	Car Laborer
2. Reed, H. H.	Car Laborer
3. Clark, Elmer	Car Laborer
4. Tignor, Lloyd	Car Laborer
5. Clark, E. P.	Car Laborer
6. Weatherly, Coy	Car Laborer
7. Clark, E. F.	Car Laborer
8. Aistrop, Dewey	Car Laborer
9. Lundy, E. P.	Car Laborer
10. Gibson, Moran	Car Laborer

EMPLOYEES	JOB CLASSIFICATION
11. Carter, Donald Ray	Car Laborer
12. Stratton, Ray	Car Laborer
13. Wade, R. E.	Car Laborer
14. Phillips, Paul H.	Car Laborer
15. Wells, O. F.	Car Laborer
16. Clark, Fred M.	Car Laborer
17. Marrs, John S.	Car Laborer
18. Lane, R. E.	Car Laborer
19. Wells, R. J.	Car Laborer
20. Watts, M. D.	Car Laborer
21. Frazier, Mosby	Car Laborer
22. Body, Paul H.	Welderman
23. Honeycutt, W. M.	Blacksmith
24. Seale, Rufus C.	Machinist
25. McCormack, D. G.	Machinist

I am of the opinion that each of the foregoing twenty-five (25) named employees of Interstate has been adversely affected by the transaction in which Southern purchased all the capital stock of Interstate. This adverse affect has been brought about subsequent to the date of the transaction and by:

a. Southern diverting to its Knoxville, Tennessee shops from the Interstate shops at Andover, Virginia the repair and painting of 467 Interstate 50 tons capacity coal cars.

b. The diverting by Southern to Frieze Enterprises, the work necessary to rebuild the 336 used cars purchased in November, 1963 from the Joseph Company for Interstate, and delivery expected to be completed in December, 1964.

c. The diverting by Southern from Interstate shop of the work required to cut down and scrap the Interstate cars no longer useable and in salvaging the parts therefrom.

d. The diverting by Southern from Interstate shops the work done and still being done in increasing the capacity of the aforesaid 336 recently purchased used cars. This work commenced first week in September, 1964.

There is no evidence of the number of men or hours involved in these projects, neither is there any evidence establishing definite dates and periods of time involved. Even if the information were available, I find no provision whereby these twenty-five (25) Interstate employees should be paid for just the time involved. I am of the opinion that when the adverse affect happens, the employees affected are entitled to the full amount of the benefits in the protection afforded them. If this were not true, then it would be premature for a suit to be instituted by any employee until after the expiration of the four years protection time, and then the suit would have to be of accounting to determine just how many hours or days such employee would be entitled to. I fail to find that this was ever contemplated by the Statute of the Commission.

Each of these twenty-five (25) employees was on furlough at the time of the transaction on June 6, 1961. The record in this case fails to reflect the dates when the adverse affect as listed above happened, so the only basis for a date of the adverse affect is the date of June 6, 1961, this being the affective date of the order approving the

transaction. It therefore, appears that applying the provisions of the New Orleans Union Passenger Terminal Case, each of the above named twenty-five (25) Plaintiffs should receive from Southern Railway Company for and during the period of four (4) years from June 6, 1961, the benefits provided in the said New Orleans Case. The formula for calculating the various amounts is simple and the Southern is very familiar with it. There is sufficient evidence in the record whereby the Special Master could calculate the benefits due each employee up to and including March 31, 1963, but that would be of little benefit as the Southern would have to pick up from that point and figure the various amounts of payment up to date.

Except however, Ray Stratton, who was furloughed December 30, 1960. This Plaintiff began working for American Cyanimide on October 16, 1961 and he waived any claim he may have for benefits subsequent to October 15, 1961. His benefits should be calculated for the period from June 6, 1961 through October 15, 1961 only (Record pages 250-252.)

However, I believe that in the event the Special Master's findings are sustained, the order entered should provide that each Plaintiff entitled to benefits hereunder shall furnish to Southern appropriate evidence of combined monthly earnings in other employment and monthly unemployment insurance benefits. This information will be needed to enable Southern to properly calculate the net benefits due each Plaintiff each month.

There is contained in this record evidence of the above earnings and insurance through the months of March

1963. If this could be withdrawn from these papers such would serve a very useful purpose.

I find no provision in the law allowing for any interest to be collected for the delayed payments.

Dated at Wise, Virginia, this 4th day of December, 1964.

CARL W. HAMILTON,
SPECIAL MASTER

APPENDIX C

OPINION OF TED DALTON, UNITED STATES DISTRICT JUDGE DATED MARCH 20, 1965

On June 12, 1959, the Southern Railway Company filed proceedings under 49 U.S.C. § 5(2) with the Interstate Commerce Commission requesting authority to acquire all the outstanding capital stock of the Interstate Railroad Company. The report of the Hearing Examiner, dated October 6, 1960, recommended the sale of Interstate's stock to Southern and, pursuant to 49 U.S.C. § 5(2)(f), imposed certain conditions for the protection of the railway labor of the Interstate company. These are known as the "New Orleans Conditions" as they were first delineated in the *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952). On February 16, 1961, the I.C.C. approved the Examiner's report, whereupon the Railway Labor Executives' Association (RLEA) filed a petition on behalf of certain employees of Interstate who had been "furloughed" from work (that is, not discharged but temporarily suspended and subject to recall) and who had not received benefits under the Commission's report. This pe-

tition for reconsideration and modification was dismissed by the I.C.C. and its original order was made effective as of June 6, 1961.

Fifty-two of these furloughed employees press their claims for compensation in this court, and the two actions originally brought have been here consolidated for decision.

By an order entered on January 17, 1963 these causes were referred to a Special Master for findings of fact and conclusions of law. The Master found that the transaction did not entitle those employees designated as "maintenance of ways and structures" employees (generally section laborers) to benefits, but that the protection of the New Orleans Conditions should be extended to twenty-five employees other than maintenance of ways and structures men (generally car laborers).

49 U.S.C. § 5(2)(f) provides:

> As a condition to its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order, such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective

> date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

There is no question or contention by either party but that the Interstate Commerce Commission had the authority to issue the protective provisions set forth in its order approving the acquisition.

The Master notes that it is clear from the decisions of the Interstate Commerce Commission that the transaction in question must be the proximate cause of the injury to the complaining employee in order for that employee to be entitled to benefits under the act. Further, the Commission expressly states that the effect of subsequent internal technological improvements by either of the carriers, *even if* made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction. *Report of Special Master* 21-22 (1964). So in this case we must consider not only whether particular employees were affected by the acquisition of control of Interstate by Southern, but whether they were affected in such a manner as under the law entitles them to receive benefits pursuant to section 5(2)(f).

Great deference must be accorded the findings of the Master since they turn in large measure on the credibility

of witnesses who have presented long, involved, and often conflicting testimony. *United States* v. *Twin City Power Co.*, 248 F.2d 108 (4th Cir. 1957). His conclusion of fact must therefore be accepted unless they are clearly erroneous. Fed. R. Civ. P. 53(e)(2); *London* v. *Troitino Bros. Inc.*, 301 F.2d 116 (4th Cir. 1962) *Esdale* v. *Edwards*, 28 F.R.D.390 (W.D.N.C. 1961).

The plaintiffs in this case represent two distinct classes of employees: maintenance of ways and structures employees and those other than maintenance of ways and structures. The claims of these two broad groups present substantially different questions of fact and so they will be treated separately in this opinion. At the outset, however, it should be noted that with regard to *all* of the employees furloughed, the Master found:

(a) that furloughing is nothing new to the employees of Interstate, the device apparently having utilized several times in the past;

(b) that all but two of the employees were furloughed *prior* to February 16, 1961, the date of the first order of the I.C.C. approving the report of the Examiner;

(c) that each was furloughed by Interstate and not by Southern;

(d) that Interstate did not act on the advice or direction of Southern in furloughing the employees; and

(e) that the action of Interstate was not in anticipation of the stock acquisition by Southern.

In addition, the Master, noted that by virtue of the transaction Interstate has become a wholly owned subsidiary of Southern, and that the two railroads still retain their separate corporate identities. In other words, there has been no merger.

I. *Employees other than Maintenance of Ways and Structures.*

Prior to the acquisition it seems that Interstate obained the cars with which it supplied its shippers of coal primarily from two sources: (1) some cars, all with a capacity of fifty tons, were built by Interstate in its shops at Andover, Virginia, and owned outright by it; while (2) a number of cars were rented from other railroads, primarily the South ern, on a per diem basis.

The evidence shows that in addition to generally being in a poor state of repair, the fifty ton cars owned by Inter state were also obsolete, as the trend in modern railroading is toward large cars, primarily of the seventy ton and one hundred ton variety. In addition, the fifty ton car lacks the strength and construction to withstand the long modern trains now in use. For this reason, Interstate began dis continuing heavy repairs and retiring these old worn out cars as they became unserviceable. With heavy repairs stopped and the cars of other railroads available for use there was no need for as many car repairmen, and certain employees (other than maintenance of ways and structures) were furloughed. The Master found from the evidence that Southern would have continued to furnish the cars needed by Interstate even if acquisition had not been allowed, and so denial of the petition would have produced no definite change in the policy of Interstate along these

lines which would have resulted in more employment for these men. He further concluded that after the acquisition Interstate continued to pay the per liem rental on the Southern cars which it used.

From the date of the acquisition, June 6, 1961, to June 1964, Interstate, for various reasons, retired 1094 cars and had some or all of them scrapped by two independent companies. Useable parts were salvaged and stored by Southern. With its fleet fast becoming unserviceable, Interstate was faced with the problem of acquiring more cars, which it could do in one (or all) of three ways: (1) by building some at its Andover shops: (2) by renting more cars from the Southern; (3) by buying the cars outright. Interstate decided to fulfill part of this need by purchasing 336 cars of the fifty ton capacity from David J. Joseph Company of Mountain Brook, Alabama, a dealer in second-hand railroad equipment. Although the purchase was handled by Southern's purchasing department (all matters of this type had been turned over to Southern), the cars were billed to and paid by Interstate. Counsel for the plaintiffs seems to contend that Interstate was obligated to *build* all the cars it required, under penalty of Southern becoming liable to the furloughed employees for benefits. His theory is that since the employees would be recalled for work if a building program were reinstated at the Andover shops the decision to buy rather than build diverted work from the Interstate employees. This was a result of the stock acquisition, he says, because Interstate is now a wholly owned subsidiary and hence it was actually Southern directing the moves. However the Master found, and correctly so, that the decision of whether to buy, build, or rent was one of policy

for management and not the Court, and that there is nothing inconsistent in saying that the same decision could have been made without the acquisition in the normal course of Interstate's business.

After purchase, the cars were sent to Frieze Enterprises of Charlotte, North Carolina, for the purpose of having that company rebuild the cars to useable type and increase their capacity.

It further appears that after the acquisition Southern did some work on Interstate cars at its Koster shops in Knoxville, Tennessee. At first the evidence indicated that there were 125 of these cars which had been sidetracked because of Interstate's decision (prior to the acquisition) to discontinue heavy repairs. It was said that the work done at Knoxville was in the nature of an experiment to see if this decision by Interstate was justified. It now appears that 467 cars, or about twenty-three percent of the total Interstate fleet in service, were diverted to the Knoxville shops and light repair was done on them. 392 are still in service 5 have been set out and require heavy repairs, and 70 have been retired and scrapped. Although the Master still found that these cars had been sidetracked, plaintiffs contended and defendant admits that they were still in service and cut out of Interstate trains by Southern. The state of repair of these cars before being pulled in by Southern is not entirely clear from the evidence.

The Master found that certain work which would have been done by Interstate employees but for the acquisition of control by Southern was diverted from Interstate, and allowed benefits to twenty-five employees. Specifically he found:

(a) that the work done on the 467 Interstate cars in Knoxville should have been done at Interstate's shops in Andover;

(b) that the work necessary to rebuild and charge the 336 cars purchased from the Joseph company should have been done at Interstate's shops in Andover;

(c) that the work done in cutting down and scrapping the unserviceable Interstate cars, done by independent contractors, should have been done at Interstate's shops in Andover.

These basis for recovery will be considered separately.

(a) *Repair of the 467 cars at the Koster shops.*

I think the Master was correct (except as to the extent of the recovery, which will be discussed later) in allowing benefits to the twenty-five employees as a result of the repair work done by Southern. This was clearly work physically diverted by Southern and was the proximate result of the stock acquisition.

From the evidence it would appear that car repair done by railroads is generally divided into three classes: (1) heavy repair; (2) light repair; and (3) running repair. Running repairs are relatively minor jobs which can be done quickly and without taking the car out of service. As a matter of courtesy, one railroad will do running repairs on cars which it is using but which belong to another company. Light repair seems to be somewhat of a misnomer as it can be a big job, short of a major overhaul, which requires taking the car out of service, at least for a time. Light repairs are *not* done on cars owned by other railroads. The heavy repair entails a major overhaul.

It seems manifest that the repair work in question should have been done at Interstate's shops in Andover. These were not cars which had been sidetracked and sent to Southern by Interstate, but were rather still in service when cut out of the trains by *Southern* and directed to the Koster shops. Defendant admits that light repair was done on these cars, and by general railroading practice, light repair is never done on the cars of another railroad, certainly not as a gratuity and not on 467 cars.

Defendant argues that even if the work had been done at Interstate's shops it would have been done by the regular crew retained and not by the plaintiffs in this case, quoting the testimony of Mr. H. L. Stuart, Assistant to the President of Interstate, for support. On the other hand Mr Willingham, the master mechanic for Interstate, testified that he had only a skeleton crew sufficient to handle *running* repairs at the Andover shops. (See Record before the Commission, p. 297). The Master found, and I cannot say that he was clearly erroneous, that twenty-five of these plaintiffs would have been called back to do the light repair work on the 467 Interstate cars.

Southern claims that the work done was merely an experiment to ascertain if Interstate's decision to discontinue heavy repairs on these cars was justified. The conclusion, according to defendant, was that the decision was justified. It is not clear from the evidence that these cars had been set out and marked for heavy repair by Interstate. The fact that they were still in service at the time, and further that 392 are *still* in service after *light* repair would seem to refute this. In addition, the Master correctly held that 467 cars had passed the stage of an "experiment."

The Master allowed the affected employees the benefit of four years' salary (with certain modifications), the maximum obtainable under section 5(2)(f). In so doing I think he erred.

The wording of the statute is somewhat ambiguous and if considered in a vacuum lends some credence to Southern's contention that the four year period describes the time during which the employees must have been affected, and not the period for which they are to receive benefits. However, looking at the Congressional Record and cases which have construed the section it is apparent that the four year provision designates the period during which, under normal circumstances, the employees are to receive pay. The remarks of conference chairman Lea in 86 Cong. Rec. 10178 are instructive on this point. He said: "It [the four year rule] means from the effective date of the order of the Commission the benefits are available for four years The order determines the date, and the protective benefits run four years from that date." See also *R.L.E.A.* v. *United States,* 339 U.S. 142 (1950) and *United States* v. *Lowden,* 308 U.S. 225 (1939).

It is clear that the employees are entitled to some benefits. However, in assessing the extent of these benefits, I think a definite distinction should be drawn between employees *discharged* and those merely *furloughed,* the former usually being entitled to the full four years' benefits and the latter being entitled to pay only for work actually lost. Although court cases and decisions of the Interstate Commerce Commission are sometimes less lucid on this point, most of them dealing with employees who have been completely

discharged, such a distinction would seem to permit a fair application of section 5(2)(f) consonant with legislative intent.

In *United States* v. *Lowden,* supra, the case holding that the I.C.C. could constitutionally prescribe protective conditions in railroad acquisitions and mergers, the Supreme Court paraphrased the effect of the order of the Commission thusly:

> It [the Commission] accordingly authorized the lease upon the conditions which it has found to be just and reasonable: that for a period not exceeding five years each retained employee should be compensated for any reduction in his salary so long as he is unable, in the exercise of his seniority rights under existing rules and practices, to obtain a position with compensation equal to his compensation at the date of the lease; that dismissed employees unable to obtain equivalent employment be paid partial compensation for the loss of their employment in specified amount . . . 308 U.S. at 228.

So the four year provision seems to have been meant to partially compensate employees who were discharged by paying them the equivalent of four years' salary ("partial compensation" in the sense that it is assumed that the employee would have remained with the railroad for an indefinite period, longer than four years, drawing full salary). Retained employees were to be compensated for any reduction in salary. Retained employees includes those on furlough.

It must be remembered that these employees were furloughed before the acquisition and not in anticipation of it. Thus, the furlough was not colorable in any sense; Interstate was wholly within its rights in utilizing this common practice which it had employed several times in the past. Assuming no acquisition had taken place, these employees would have been paid only when recalled by Interstate for work. I think, therefore, that they are entitled to protective benefits only when *they should have been* recalled by Interstate and were not because of the acquisition of control by Southern. Any other arrangement would result in these employees receiving benefits during periods for which they would not have been paid had there been no acquisition, and being paid double for periods during which they may be recalled for work in the future (i.e., the regular salary plus the protective benefits). The purpose of the act was not to give the employees affected by the transaction a windfall and put them in a *better* position, but rather to insure that they will not be put in a worse position—that is, that they will maintain the status quo. The Interstate employees are to be paid for the work on the 467 Interstate cars which was done by Southern employees, and Southern is directed to forthwith furnish adequate up-to-date information by which the amount of work can be ascertained.

The Master seemed to think that unless the plaintiffs were given benefits for the full four years they would have to wait until the end of the four years to recover anything, as only then could they compute exactly how much work had been diverted. The result reached here will not require them to do this, but it does entail the complex procedure of this court retaining jurisdiction to award further benefits if it appears that more work is diverted

from Interstate employees in the future. However the court will assume that both sides will continue to act in good faith—the plaintiffs will bring no frivolous claims and defendant will be open and above board in not depriving plaintiffs of any work to which they are entitled.

Defendant specifically assigns error to the granting of benefits to four employees: Rufus C. Seale, D. C. McCormack, W. M. Huneycutt, and Paul H. Body. As to the first three, it is claimed that because of the nature of their jobs these men would not have worked on the cars even if they had been repaired at Andover. The Master, however, after careful consideration of the work necessary to repair the cars, found that they would have and the Court cannot say that this is clearly wrong. The evidence shows that Body himself requested a furlough to enable him to investigate another job, as shown in the Record before the Master, p. 405 and p. 498, and defendant contends that Body is therefore entitled to no consideration. However, it is not the furlough which is in question as to any of these employees, but rather the failure to give them a chance to return to work. If Body had been given the opportunity and declined, he would be entitled to no benefits. The evidence disclosed that he currently has another job in Florida. This fact will go to the amount of benefits to which he is entitled, but not to his right to any benefits at all. The record shows that he is still on furlough and technically remains an employee of Interstate. (Record before the Master, p. 498.)

Plaintiffs make a claim for interest on the delayed payment of benefits. The Master found no provision in the law allowing interest in this case and Counsel has directed this court to none. The Master's disallowance of interest will stand.

(b) *Work done in rebuilding and increasing the capacity of the* 336 *cars purchased from David J. Joseph Company.*

In giving the employees benefits for the work done by Frieze Enterprises I think the Master erred. Assuming that Southern was responsible for the decision to have the cars rebuilt and enlarged by Frieze, it might be well to ask, "*Why* was the work given to Frieze rather than Interstate?" In the case of the cars repaired in Knoxville we have a pretty clear example of the evil which section 5(2)(f) was designed to combat—work which should have been done by Interstate employees was instead performed by *Southern* employees. It is easy to see that the acquisition of control was the proximate cause of this diversion. However, it is not as simple to trace the effect of the acquisition where the work in question is done by a contractor independent of both railroads. Assuming that Interstate could have done the work, there seems to be only two reasons it would be given to Frieze: (1) Frieze could do it better at comparable cost; or (2) Frieze could do the same work at less cost. In either case the same decision could (and probably should) have been made by Interstate even if there had been no acquisition. As the decision of whether to buy or build cars was one for management and not the Court, so was the decision as to whether to rebuild at Andover or farm the work out.

As defendant points out, what was done was no different in principle from purchasing the cars built to specification from the Joseph Company. The Master seems to indicate that there would have been no diverting of work within the standards set out by the Interstate Commerce Commission

if the work had been done by the David Joseph Company In his report on Reconsideration, he says on page 13: "This is extra work on the cars performed by a firm other than David J. Joseph Company of Mountain Brook, Alabama from whom the cars were purchased." In all the deference to the Master this distinction (if in fact it is being made) seems to be somewhat artificial and without basis in logic. In both cases, additional work will be done on the cars purchased, and in neither case will Interstate employees do the work. Plaintiffs have failed to carry the burden of showing that this was work diverted from Interstate as a result of the transaction.

(c) *The 1094 cars scrapped by independent contractors.*

What has been said with reference to the cars rebuilt and enlarged by Frieze Enterprises applies with equal force here, as the two situations are completely analagous. Again, whether to scrap the cars itself or employ an independent contractor was a policy decision for Interstate's management. Southern would have no reason to "divert" work from Interstate just for the sake of diverting it, it must be assumed that the decision to have the cars scrapped elsewhere was grounded on some valid economic basis. It was therefore a decision which Interstate could certainly have made without the acquisition.

There is evidence that salvaged parts from these scrapped cars are being stored by Southern. However, none of the plaintiffs in this action is employed in the stores department of Interstate.

Counsel for the plaintiffs puts forward various other diverse claims, in addition to those already considered, for

benefits to be allowed all the plaintiffs (other than maintenance of ways and structures) in this case. The chief contention seems to boil down to this: the men are affected whether or not work is removed by reason of Interstate's acquisition of newer and larger cars from Southern, allegedly without paying any per diem. Along these same lines, counsel contends that the interchange between Southern and Interstate has been eliminated and all the cars are now treated as belonging to one railroad—i.e., the Southern. [The employees are affected, according to counsel, because there are now less cars in use (and thus less to repair) by virtue of the larger capacities of those employed and in addition the cars are newer and require less repair.] The Master found no merit in these claims and this court agrees.

As has been pointed out, Interstate was renting cars from Southern before the transaction, but there is some evidence that this use increased after the stock acquisition. This might be partially explained (although there is no evidence on the point) if Interstate now rents exclusively from Southern and no other company. Even though this might be as a result of the transaction it would not be such as would give rise to any benefits to Interstate employees. It has been admitted that Interstate had to acquire more modern cars. Some of these it chose to acquire by purchase from the David J. Joseph Company, a decision which the Master correctly found to be for management. If it chose to acquire some by increased rentals from Southern, this was likewise a decision for management which had great likelihood for occurrence without the acquisition. The employees were affected to be sure, but not as a direct result of the transaction.

The Master found that Interstate and Southern retained their separate corporate identities and that Interstate continued to pay the per diem to Southern. He further noted that "the fact that the interchange is not physically made at the time of arrival of the cars is insignificant to the issue, since the dates for calculating wheelage is recorded." (Master's Report on Reconsideration, p. 14.) He was clearly correct in these findings that the cars were not pooled.

Plaintiffs devote much time to a discussion of the Washington Job Protection Agreement of May 21, 1936. This is a collective bargaining contract entered into by most of the railroads and Brotherhoods in the United States. In the *New Orleans Union Passenger Terminal Case,* supra, the I.C.C. prescribed, among other things, the protective benefits afforded by the Washington Agreement. To that extent, they are prescribed here, since the Commission applied the New Orleans Conditions to this case. However, for the Washington Agreement to be self-executing, the employees must be affected by a "co-ordination," which is defined as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." (Section 2, Washington Agreement). For the record, the court affirms the Master's findings that there was no co-ordination within the meaning of the Washington Agreement. The Master expressed this position very well when he said:

> By no stretch of the imagination can it be said that Interstate lost its identity as a separate corporate entity. It is yet a separate corporation operating under

> its own name, and as such subject to all the rules and regulations of the I.C.C. applicable to railroads. The change is in the ownership of its capital stock which is now owned by Southern. There has been no unification, consolidation or merger. Those terms by their own definition mean a loss of identity, as by the issuance of the corporation being absorbed.

(Master's Report on Reconsideration, pp. 9-10.)

In light of the strict attitude taken toward mergers and acquisition since the passage of the revised section 7 of the Clayton Act of 1950, the fact that one railroad is able to acquire all the capital stock of another shows that the situation in that industry is regarded as extraordinary and has been singled out for special treatment. Great competition from other modes of transportation have led to a steady decrease in the business of railroads, especially in the area of passenger service, and has prompted some to designate it a "failing industry." The whole purpose of permitting an acquisition such as the one in the instant case is to give a small railroad a chance to survive by permitting it to take advantage of economies of operation which can be achieved as a wholly owned subsidiary of a large company.

The Interstate Commerce Commission, as well as the railroads themselves, realized the necessity for protection of the employees of the acquired company. At the same time, however, the protective conditions imposed are not meant as penalties which would neutralize any economies thus realized. The Master deals very well with this problem on page 7 of his Report on Reconsideration:

While not explicitly so stated, it seems to be a contention of the Plaintiffs throughout that no employee actively employed on the date of filing of the application by Southern with the I.C.C. could be deprived of employment or placed in a worse position because of the transaction, or because of any program of economies resulting from the transaction.

The I.C.C. at page 15 of its report dated November 7, 1962, rejected the "attrition" rule condition and clarified what it had in mind by saying:

". . . conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be with the objectives of the national transportation policy under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

II. *Maintenance of Ways and Structures Employees.*

Turning now to those employees designated as "maintenance of ways and structures" we find that none were allowed benefits by the Master. His reasoning was that their jobs were diminished as a result of subsequent internal technological improvements, noting that the I.C.C. has expressly stated its intention not to allow benefits to employees merely affeced by such improvements. Plaintiffs admit the law on this point, but contend that the displacement of these employees was not due to internal technological improvements but rather to a consolidation of

equipment. As already noted, the Master found that there was no consolidation of equipment, and his findings as to maintenance of ways and structures employees, not being clearly erroneous, will be affirmed.

All of these employees but two (who were furloughed in June, 1961) were furloughed prior to the acquisition of Interstate by Southern. There is little evidence to indicate that the reason for this furlough was other than the seasonal cut-offs which have also occurred in past years. There is some evidence that these men were furloughed because of the introduction of machinery and equipment used in the maintenance of tracks, but the record shows that there was very little equipment owned by Interstate prior to the acquisition. The Master found that these employees would have been called back to work except for the fact that after the acquisition Interstate began to *rent* some modern track and maintenance equipment which has replaced these employees.

No work has been removed from Interstate lines, but rather the same amount of work is being done with these machines and fewer men. It seems clear that the utilization of machines was a case of internal technological improvement. There is no way to move any work on the track over to the Southern, and the improvements could have been made by Interstate whether or not Southern had purchased it.

Plaintiffs admit that loss of jobs through scientific advancement is inevitable, but contend that this situation is not what the I.C.C. meant by subsequent internal technological improvements. Counsel seems to contend that since the machines were owned by Southern before the

acquisition, the improvement was therefore not "subsequent" and he quotes from an order issued by the Interstate Commerce Commission in the *Southern Railway Control—Central of Georgia Case,* Finance Docket 21400, to substantiate this position:

> In authorizing the transaction, we are not unmindful of the fact, stressed by the Association on exceptions, that future technological improvements, made possible by increased earnings as a result of the economies which would be effected by the transaction, may result in further displacement of employees.

In the same case, the Commission further stated:

> However, the 'effect' of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.

In the Central of Georgia case, the improvements were made possible by improved financial conditions on the part of the Central Railway, and plaintiffs seem to argue that internal technological improvements are limited to that situation; in other words, to be applicable in this case, the situation would have to be one where Interstate was placed in a better economic position as a result of the transaction, and thus was *subsequently* able to buy or rent new machinery.

This position is untenable. It seems clear that the purpose of the clause (*even if* made possible by improved financial circumstances partly attributable to the unification of control . . .") was to apply a general rule to the specific case at hand, and not to limit the concept of internal technological improvement to the facts of the Central of Georgia case. The fact that Southern had modern equipment available for rental does not change the basic nature of the improvement. In fact, there is merit in the contention that this situation fits the facts of the Central of Georgia case since Interstate did not begin extensive equipment rental until after the acquisition.

As the work continued to be performed exclusively by Interstate employees, it was internal to the Interstate line. As the I.C.C. has pointed out, one of the purposes of mergers and acquisitions is to promote economy partially through the reduction of personnel. See Master's Report on Reconsideration, p. 4.

It appears that the main factor which influenced the Master's findings with relation to these employees was the decision of the three judge court for the Eastern District of Virginia in the case of *R.L.E.A.* v. *United States,* Civil Action No. 3004, which affirmed the interpretation of the I.C.C. in the Central of Georgia case. Counsel for plaintiffs stresses the fact that in that case Southern was merely a shareholder in the Central, while here it is full owner of all the stock of the Interstate. Sole stock ownership, however, does not in this case alter the character of what is otherwise an internal technological improvement.

The Master's Report is affirmed in part and modified in part, in accordance with this opinion of the Court.

The result of this decision is to allow benefits to these plaintiffs (car employees) who on furlough were affected by the diversion of the 467 cars to the Koster shops of Southern for repairs.

Counsel are requested to promptly prepare and furnish to the Court a detailed up-to-date statement of the labor expended at the Southern shops on these cars, together with a list of the employees who would be entitled to this work had it not been transferred, and the respective amounts due each of them.

Defendant shall pay the costs of this proceeding, including the fee due the Special Master for the supplemental report.

Respectfully,
Ted Dalton
United States District Judge

Dated: March 20, 1965.

ORDER ENTERED MARCH 22, 1965
BY TED DALTON, DISTRICT JUDGE:

This action came on to be considered upon the papers and proceedings hereinbefore read and had, orders hereinbefore entered, and particularly upon the reports of Carl W. Hamilton, Special Master, filed herein, and the briefs and oral arguments of counsel.

By reason of the Report on Reconsideration by the Special Master superceding the initial report filed by said Special Master, the Court deems it only necessary to pass upon the respective objections to the Report on Reconsideration filed December 7, 1964.

The Court, doth affirm in part and modify in part the findings of said Special Master, in accordance with the written opinion filed herein March 20, 1965 and doth Adjudge and Order that the rights and liabilities of the parties shall be determined in accordance with said written opinion, as implemented by this order; and all other objections to the report are sustained.

The Court doth allow to the twenty-five (25) plaintiff employees listed as car shop repairmen or car laborers, namely; (1) Frank L. Swacker, Jr.; (2) H. H. Reed; (3) Elmer Clark; (4) Lloyd Tignor; (5) E. P. Clark; (6) Coy Weatherly; (7) E. F. Clark; (8) Dewey Aistrop; (9) E. P. Lundy; (10) Moran Gibson; (11) Donald Ray Carter; (12) Ray Stratton; (13) R. E. Wade; (14) Paul H. Phillips; (15) O. F. Wells; (16) Fred M. Clark; (17) John S. Marrs; (18) R. E. Lane; (19) R. J. Wells; (20) M. D. Watts; (21) Mesby Frazier; (22) Paul H. Body; (23) W. M. Honeycutt; (24) Rufus C. Seale; and (25) D. G. McCormack, the respective amounts to which each of said employees would have been entitled for labor on said 467 cars had not the work on said cars been transferred from Interstate Railway shops to the Knoxville shops of Southern Railway Company and the defendant is directed to forthwith furnish the Court the necessary information for the determination of the correct amount due; it is accordingly

ORDERED

that the defendant, Southern Railway Company, pay the total sum due to counsel for plaintiffs to be distributed by counsel to the said employees.

The Court, upon consideration of the question of costs, doth require the defendant to pay costs of this proceeding, and doth vacate and set aside that portion of the order of September 1, 1965, requiring plaintiffs to pay any portion of the compensation for the services of the Special Master, Carl W. Hamilton, and the Court doth allow the additional sum of $3500.00 as reasonable compensation to Carl W. Hamilton, Special Master, for his additional services herein in the hearings, preparation and filing of the Report on Reconsideration.

To the end that the condition of the twenty-five car repairmen above named who are granted a recovery herein may not be worsened by having to bear any burdens in the way of attorney's fees and costs pursuing the relief to which they are entitled, the Court doth further require that the defendant, Southern Railway Company, pay to Messrs. Shannon and Newman, counsel for said plaintiffs, a reasonable attorney's fee for legal services and expenses rendered in representing said 25 plaintiffs herein, which amount will be fixed by the Court.

And now this case is continued awaiting the information required herein.

A copy of this order, together with copy of the opinion of the Court is directed to be mailed to counsel of record.

ENTER this order:

March 22, 1965.

/s/TED DALTON
UNITED STATES DISTRICT JUDGE

STATEMENT OF AMOUNTS TO WHICH PLAINTIFFS NAMED IN THE COURT'S ORDER OF MARCH 22, 1965 ARE ENTITLED UNDER SAID ORDER

Name	Allowance Before Deductions[1]	Less Unemployment Benefits[2]	Less Outside Earnings[3]	Amount Of Recovery
Frank L. Swacker, Jr.	$ 719.09	$ 294.90	None	$ 424.19
H. H. Reed	904.31	489.60	None	414.71
Elmer Clark	872.54	489.60	None	382.94
E. P. Clark	891.46	499.80	None	391.66
Lloyd Tignor	898.55	489.60	None	408.95
Coy Weatherly	885.43	479.40	None	406.03
E. F. Clark	826.03	489.60	None	336.43
Dewey Aistrop	859.69	479.40	None	380.29
E. P. Lundy	843.44	489.60	None	353.84
Moran Gibson	821.57	489.60	None	331.97
Donald Ray Carter	834.94	510.00	None	324.94
Ray Stratton	993.32	397.80	$ 212.72	382.80
R. E. Wade	1072.15	None	838.73	233.42
Paul H. Phillips	680.53	408.00	74.28	198.25
O. F. Wells	890.63	None	484.64	405.99
Fred M. Clark	902.04	326.40	324.39	251.25
John S. Marrs	875.60	367.20	430.43	77.97
R. E. Lane	1005.58	102.00	928.40	None
R. J. Wells	971.85	102.00	539.26	330.59
M. D .Watts	1140.13	142.80	828.29	169.04
Mesby Frazier	1037.30	30.60	920.43	86.27
Paul E. Body	1007.73	None	1368.30	None
W. M. Huneycutt	1014.38	None	873.40	140.98
D. G. McCormack	1013.14	204.00	416.43	292.72
Rufus C. Seale	17.10	None	None	17.10
TOTAL				$6842.32

[1] Allowance as stated in Stuart Affidavit of April 20, 1965, under ICC conditions before deductions for unemployment benefits and outside earnings as required by said conditions.

[2] Unemployment benefits paid for unemployment during the period August 22, 1961—October 24, 1961, inclusive.

[3] Outside earnings during the period August 22, 1961—October 24, 1961, inclusive.

ORDER ENTERED MAY 3, 1965
BY TED DALTON, DISTRICT JUDGE:

FINAL ORDER

The Court having been furnished with the information which it directed the defendant, Southern Railway Company, to furnish to the Court by its order of March 22, 1965, and the Court having determined that the correct amount of the total recovery granted to the plaintiffs named in said order, properly calculated in accordance with the Interstate Commerce Commission's employee protective conditions under which said recovery was granted by the Court, is $6,842.32, it is accordingly

ORDERED

that the defendant, Southern Railway Company, pay the aforesaid sum of $6,842.32 to counsel for plaintiffs, Messrs. Shannon and Newman, to be by them distributed as directed in the Court's order of March 22, 1965; that the defendant, Southern Railway Company, pay to said counsel for plaintiffs, Messrs. Shannon and Newman, the further sum of $2,280.77 as the attorney's fee fixed by the Court pursuant to its aforesaid order; and, further, that the defendant, Southern Railway Company, pay the costs of this proceeding, including the additional fee to the Special Master, Carl W. Hamilton, as ordered by the aforesaid order of the Court.

A copy of this order is directed to be mailed to counsel of record.

ENTER this order:

Ted Dalton
UNITED STATES DISTRICT JUDGE

May 3, 1965.

ORDER ENTERED MAY 20, 1965
BY TED DALTON, DISTRICT JUDGE:

Upon further consideration of the question of attorneys' fees allowed to counsel for plaintiffs in the final order entered herein on May 3, 1965, the Court is unable to find authority in the statutes or decisions in support of awarding attorneys' fees, therefore, it is

ADJUDGED and ORDERED

that the provision of said order requiring defendant to pay to counsel for plaintiff attorneys' fees is vacated and set aside; otherwise the final order shall reman in full face and effect.

The Clerk is directed to send a copy of this order to counsel of record.

ENTER:

/s/ Ted Dalton
United States District Judge

May 20, 1965

APPENDIX D

No. 10,070

Frank L. Swacker, Jr., et al., and
Railway Labor Executives' Association,
Appellants,

versus

Southern Railway Company,
Appellee.

No. 10,083.

Frank L. Swacker, Jr., et al., and
Railway Labor Executives' Association,
Appellees,

versus

Southern Railway Company,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ABINGDON.
TED DALTON, CHIEF DISTRICT JUDGE.

(Argued January 3, 1966. Decided April 20, 1966.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF and BRYAN, Circuit Judges.

Carl W. Newman and William G. Mahoney (R. C. Shannon, and Mulholland, Hickey & Lyman, and Shannon and Newman on brief) for Appellants in No. 10,070 and Appellees in No. 10,083, and Jerome Ackerman (John P. McKenna, W. Graham Claytor, Jr., James I. Hardy. Robert T. Winston and Leslie M. Mullins, and Covington & Burling on brief) for Appellee in No. 10,070 and Appellant in No. 10,083.

ALBERT V. BRYAN, Circuit Judge:

The Interstate Commerce Act, 49 USC 5 (2) (f), assures employees against prejudice resulting from any transaction, among others, in which one carrier acquires control of another as permitted by the Act, 49 USC 5(2) (a) (i) After the acquisition by the Southern Railway Company of the whole of the capital stock of the Interstate Railroad Company, 52 of the latter's employees sued Southern in the District Court invoking these assurances. In short, they say that they were furloughed in anticipation of the acquisition and were not recalled to their jobs because their work was absorbed by Southern.

The plaintiffs were: 12 maintenance-of-way workers (section laborers)[1], 26 maintenance-of-equipment workers (car laboreres)[2], 7 machinists (including one blacksmith)[3] and 7 other employees classified generally as clerks.[4]

None of the claims of the section laborers or clerks were sustained. However, 21 of the car laborers and 4 machinists prevailed. The unsuccessful employees now appeal the denial of their claims, and Southern appeals the award to the 25. We overrule the appeals and uphold the determination of the District Court.

The Act authorizes a carrier, with the approval of the Interstate Commerce Commission, to acquire control of another carrier through ownership of its stock, 49 USC 5(2)(a)(i), but in this approval the Commission is required

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[1]They are: Elmer Adams, Willie E. Bledsoe, Earl A. Collins, Robert L. Creech, Beldon Fletcher, Charles B. Fletcher, Curtis Holbrook, Billy Jarrett, Glen C. Kindle, F. L. Lane, Cecil R. Laney, and Lloyd Livesay.

[2]They are: Dewey Aistrop, Donald R. Carter, E. P. Clark, Elmer Clark, E. F. Clark, Fred M. Clark, Coy Flores, G. M. Frazier, Mesby Frazier, Moran Gibson, W. H. Holt, Milford V. Johnson, R. E. Lane, Elmer P. Lundy, John S. Marrs, Paul H. Phillips, H. H. Reed, Ralph W. Slagle, Ray Stratton, Frank L. Swacker, Jr., Lloyd Tignor, R. E. Wade, M. D. Watts, Coy Weatherly, O. F. Wells, and R. J. Wells.

[3]They are: Paul H. Body, Elmo Bush, F. E. Cooper, Jack Coward, William M. Huneycutt, D. G. McCormack, and R. C. Seale.

[4]They are: Raymond Davidson, William H. Fields, Louise Fletcher, William Howard Johnson, Jr., Willis M. Jones, Jr., June Luntsford and Kyle Wampler.

to protect the interests of the employees affected by the acquisition, the Act prescribing, 49 USC 5(2)(f), these terms:

> "(f) As a condition of its approval . . . of any transaction [including a stock acquisition as here] . . . the *Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.* In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order *such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment,* except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

The application of Southern seeking ICC approval of its purchase of Interstate's capital stock was filed in June 1959 and approved in February 1961, effective June 6, 1961. To guarantee protection of Interstate's employees pursuant to the Act, the Commission in the approval imposed upon Southern what are known as the New Orleans Conditions, which are stated in New Orleans Union Passenger Terminal Case, 282 ICC 271.

The plaintiffs were all furloughed—not discharged—prior to the effective date of Southern's acquisition. They charge, however, that they were relieved in anticipation of the acquisition, and but for the acquisition they would have

been recalled to do the work specified in their complaints, which they say was Interstate's. On these premises the plaintiffs contend that they were "affected" by the transaction and were thereby put "in a worse position with respect to their employment." They claim the full amount of their respective wages computed, under the New Orleans Conditions, over the statutory period of 4 years next ensuing from the date of acquisition, June 6, 1961, or for the lesser period if their employment was less than 4 years.

Interstate is located entirely within Wise County, Virginia. The main line extends from Andover through Appalachia to Miller Yard, a distance of approximately 30 miles, connecting with Southern at Appalachia as well as with other roads there and along the way. Branches run off to coal mines in the area. The railroad's principal operation is the transportation of coal received from adjacent mine or as an intermediate carrier for other roads. Total trackage is about 88 miles and the rolling stock includes approximately 3000 50-ton hopper-type coal cars. The offices, main yard, and maintenance and repair shops, where all locomotives, cars and other equipment were maintained and where new cars had once been built, were at Andover.

The ICC found that Interstate's operating revenues from coal traffic did not warrant the retention of the fleet of 3000 cars, all of which were old and somewhat obsolete, although Interstate actually needed 6000 cars to supply its shippers of coal. Its road and other equipment were in excellent condition. Interstate showed a favorable income balance only by reason of the use of cars of other carriers, the earnings therefrom exceeding the per diem rentals of such cars.

A 50-ton car was not profitable because transportation was more economically and speedily handled in cars of 70-,90-and 100-ton capacity. The Commission also found that Interstate's expense in maintaining its cars was rapidly increasing and that their size and age did not warrant rebuilding: "[W]ith a fleet of old coal cars of inadequate capacity it appears to be faced with a choice of either foregoing its car-hire rents upon which it relies for its net income, or taking on a dangerously onerous debt for new equipment, or becoming part of a trunk line system". The Commission approved the last choice.

The District Court found there was no alternative—that if the stock control had not been transferred to Southern, Interstate would have been forced from time to time to retire cars as they became useless and depend entirely upon those of other railroads. As a matter of fact, within 3 years after the acquisition, Interstate set aside more than 1000 of its cars.

Underlying consideration of all of its decisions in this case are the following adequately supported findings of the District Court:

> "At the outset, however, it should be noted that with regard to *all* of the employees furloughed, the Master found [and the Court agreed]:
>
> (a) that furloughing is nothing new to the employees of Interstate, the device apparently having been utilized several times in the past;
>
> (b) that all but two of the employees were furloughed *prior* to February 16, 1961, the date of the first order of the I.C.C. approving the report of the Examiner:

(c) that each was furloughed by Interstate and not by Southern;

(d) that Interstate did not act on the advice or direction of Southern in furloughing the employees; and

(e) that the action of Interstate was not in anticipation of the stock acquisition by Southern."

Car Laborers (26) and Machinists (7)

These 33 employees have common grievances and press related arguments. With the exception of W. H. Holt, they were furloughed before the ICC examiner's report in October 1960, and he refers to the reason for their lay-off as follows: "Recently it [Interstate] has been able to reduce its personnel by about 30 employees as a result of retiring old worn-out cars and substituting therefor applicant's 100-ton cars, thereby reducing the number of cars handled, and by effecting internal economies in maintenance of way and structures."

Holt, a car laborer, was *discharged* on July 12, 1961 because of intoxication during working hours. For this reason his claim was denied by the master and the Court. We find ample evidence to support this action.

Furloughed car laborers Frazier, Johnson, Slagle and Flores were also denied awards. The first 3 were found to be employed as car inspectors at locations other than Interstate's repair shop. Hence they were not touched by the removal of the work of which they complain, for it would have been performed at the shop. Flores, a boiler-fireman, had been furloughed in May 1960, long prior to the acquisi-

tion, being displaced by an Interstate employee having seniority over him. Of the 7 machinists, the claims of Coward, Bush and Cooper were denied. They had been furloughed in December 1960 since their work, formerly performed on two shifts, was consolidated into one and their seniority was subordinate to those employees retained on the shift. For these reasons none of these furloughs were found by the master or the Court to have been the result of the acquisition, and there is no basis for disturbing this finding.

This leaves 25 employees—21 car laborers and 4 machinists—who contend that they were adversely affected by the following incidents: (1) the pooling of Interstate and Southern cars and the elimination of the interchange at Appalachia; (2) the repair of 467 of Interstate's cars at the Southern shops in Knoxville, Tennessee from August to October 1961; (3) the diversion to a car-building contractor of all work necessary to reconstruct and increase the capacity of 336 used cars purchased by Interstate in November 1963; and (4) the diversion from Interstate of all the work necessary "to cut down and scrap" 1094 Interstate cars no longer usable, and to salvage and store the parts therefrom.

(1) *Pooling and Interchange Elimination.* The contention of the 25 employees, as well as of the other furloughed employees, that they were adversely affected by the pooling of the cars of the two railroads is not sustainable. Actually, there was no pooling in the sense that no distinction was made between the ownership of the cars by the two railroads after the acquisition. Indeed, separate records were kept of the use of Interstate's cars by Southern, and of Southern's cars by Interstate, and rentals paid according to these reciprocal uses. True, more Southern cars were used after the acquisition than before but this was because of the

lack of serviceable Interstate cars. Indeed, the availability of Southern cars was one of the grounds upon which the ICC examiner recommended the stock transfer. Thus he said:

> "In the opinion of Interstate's President, the interests of all concerned in its operation would be best served by having it become a part of the applicant's system, the principal carrier upon whose lines its coal traffic is consumed and the one best equipped to diversify its traffic and *to supply the cars necessary for the preservation of its service.*" (Accent added.)

The interchange of cars is the process of restoring to each railroad its cars in the possession of the other. The evidence shows that interchange facilities were physically available after the acquisition as before. However, instead of withdrawing their respective cars from a train, to save the time of switching the cars were left in the train, but each railroad accounted to the other for the use of the other's cars. The computation is currently made upon a "wheelage" basis, that is the distance traversed by the car in such use.

The District Judge quite satisfactorily described and explained why he found no injury to the employees by reason of the "pooling" and the "omission" of the interchange. He said:

> "The chief contention seems to boil down to this: the men are affected whether or not work is removed by reason of Interstate's acquisition of newer and larger cars from Southern, allegedly without paying any per diem. Along these same lines, counsel contends that the

interchange between Southern and Interstate has been eliminated and all the cars are now treated as belonging to one railroad—i.e., the Southern. (The employees are affected, according to counsel, because there are now less cars in use (and thus less repair) by virtue of the larger capacities of those employed and in addition the cars are newer and require less repair.) The Master found no merit in these claims and this court agrees.

"As has been pointed out, Interstate was renting cars from Southern before the transaction, but there is some evidence that this use increased after the stock acquisition. This might be partially explained (although there is no evidence on the point) if Interstate now rents exclusively from Southern and no other company. Even though this might be a result of the transaction, it would not be such as would give rise to any benefits to Interstate employees. It has been admitted that Interstate had to acquire more modern cars. . . . If it chose to acquire some by increased rentals from Southern, this was likewise a decision for management which had great likelihood for occurrence without the acquisition. *The employees were affected to be sure, but not as a direct result of the transaction* (Accent added.)

"The Master found that Interstate and Southern retained their separate corporate identities and that Interstate continued to pay the per diem to Southern. He further noted that 'the fact that the interchange is not physically made at the time of arrival of the cars is insignificant to the issue, since the dates for calculat-

ing wheelage is recorded.' . . . He was clearly correct in these findings that the cars were not pooled."

(2) *Repair of 467 Interstate Cars at Southern Shops.* In August 1961, after the acquisition, Southern began repairs at its Knoxville, Tennessee shop on 467 of Interstate's 50-ton cars. The master and the District Court found that the work could have, and but for the acquisition would have, been done at Interstate's shop. Accordingly the Court held that to the extent of this work the employees had been hurt by the acquisition.

Southern contends that no allowance on this segment of work can be sustained. Its first gound for this assertion is that this undertaking by Southern was not a result of, but rather was created by the acquisition. The argument is that Interstate was not physically equipped or financially able to perform the work at its shop, and therefore it was necessarily performed by Southern. The second ground is that the proof fails to demonstrate that the complaining employees would have been recalled to do this work. We disagree, as did the District Court, with Southern's contention.

It must be remembered that Interstate was in need of cars. It rented some from Southern and, as we shall see in a moment, it purchased 336 used cars in November 1963. While it had ceased doing heavy repairs at its shop, it had not withdrawn from light repairs. Concededly, the work done by Southern on the 467 cars of Interstate consisted of light repairs. This work was started within 3 months after the acquisition. Except for that transaction, the District Court found, this work would have been performed at the

Interstate shop in Andover. We have no warrant for overturning these findings. On this subject the District Judge stated:

> "I think the Master was correct (except as to the extent of the recovery, which will be discussed later) in allowing benefits to the twenty-five employees as a result of the repair work done by Southern. This was clearly work physically diverted by Southern and was the proximate result of the stock acquisition.
>
> "From the evidence it would appear that car repair done by railroads is generally divided into three classes: (1) heavy repair; (2) light repair; and (3) running repair. Running repairs are relatively minor jobs which can be done quickly and without taking the car out of service. As a matter of courtesy, one railroad will do running repairs on cars which it is using but which belong to another company. Light repair seems to be somewhat of a misnomer as it can be a big job, short of a major overhaul, which requires taking the car out of service, at least for a time. Light repairs are *not* done on cars owned by other railroads. The heavy repair entails a major overhaul.
>
> "It seems manifest that the repair work in question should have been done at Interstate's shops in Andover. These were not cars which had been sidetracked and sent to Southern by Interstate, but were rather still in service when cut out of the trains by Southern and directed to the Koster [Knoxville] shops. Defendent admits that light repair was done on these cars, and by general railroading practice, light repair is never

done on the cars of another railroad, certainly not as a gratuity and not on 467 cars.

* * *

"Southern claims that the work done was merely an experiment to ascertain if Interstate's decision to discontinue heavy repairs on these cars was justified. The conclusion, according to defendent, was that the decision was justified. It is not clear from the evidence that these cars had been set out and marked for heavy repair by Interstate. The fact that they were *still in service at the time,* and further *that* 392 *are still* in service after *light* repair would seem to refute this. In addition, the Master correctly held that 467 cars had passed the stage of an 'experiment.'" (Accent added.)

Although there is a conflict in the evidence on the point, we cannot say the District Judge erred in finding that the crew at the Andover shop was not adequate to do this work and this required the recall of the 25 furloughed employees.

The master allowed these employees the benefit of 4-years salary, with deduction for unemployment insurance received and wages received in other work, in accordance with the maximum obtainable under section 5(2)(f) of the Act. The District Judge disagreed and, correctly we think, limited the recovery to the amounts that these 25 employees would have received had they performed the repair work on the 467 cars.

In this conclusion, the District Judge noted that these employees had not been constantly engaged but were fur-

loughed from time to time. Consequently, without the stock acquisition they would not have been employed each day. It seems a logical construction of the statute. The District Judge reasoned in this way:

> "It must be remembered that these employees were furloughed before the acquisition and not in anticipation of it. Thus, the furlough was not colorable in any sense; Interstate was wholly within its rights in utilizing this common practice which it had employed several times in the past. *Assuming no acquisition had taken place, these employees would have been paid only when recalled by Interstate for work.* I think, therefore, that they are entitled to protective benefits only when they *should have been* recalled by Interstate and were not because of the acquisition of control by Southern. Any other arrangement would result in these employees receiving benefits during periods for which they would not have been paid had there been no acquisition, and being paid double for periods during which they may be recalled for work in the future (i.e., the regular salary plus the protective benefits). The purpose of the act was not to give the employees affected by the transaction a windfall and put them in a *better* position, but rather to insure that they will not be put in a worse position—that is, that they will maintain the status quo. The Interstate employees are to be paid for the work on the 467 Interstate cars which was done by Southern employees, and Southern is directed to forthwith furnish adequate up-to-date information by which the amount of work done can be ascertained." (Accent added.)

It must be recalled that the master found, and the Court agreed, that these employees had been laid off beginning in May 1960 and continuing until the last of 1960 because "these employees had nothing to do and there was nothing upon which they could perform labor. They were surplus employees and no longer needed unless a program for building cars at the Andover, Virginia, shops was reinstated." Hence, their employment had become uncertain and precarious many months before the acquisition, and not in anticipation of it.

Before entering final judgment the Court required an ascertainment of the amounts due each of these 25 employees in regard to the diverted work on the 467 cars, and this sum was specifically allotted to them in the final order.

(3) *Reconstruction and Enlargment of 336 Cars.* More than 15 months after the acquisition, Interstate purchased 336 50-ton used cars with the intention of converting them to carry greater loads. This work was done by an independent contractor at the direction of Interstate's management. The master held that it could have been done in the Andover shop of Interstate. In this he was overruled by the District Judge. The latter's ruling was based on the fact that the work was not done by Southern and that the means selected by Interstate to satisfy its need for additional cars was an allocation of work within the discretion of Interstate's management. We find no fault with this determination.

(4) *Cutting Down and Scrapping of Interstate Cars, and Salvaging of Parts.* Independent contractors were employed to scrap 1094 cars belonging to Interstate, salvage the parts and store them with Southern. For the same reasons he expressed with reference to the reconstruction of

the 336 cars, the District Judge overruled the master's award to the 25 employees as damages for failure to have this work done by Interstate employees. Here, again, Southern was not involved, save in the immaterial respect of storage, and the diversion was no more than the exercise of a management judgment. There is no basis for upsetting this conclusion.

Section Laborers

The 12 maintenance-of-way employees—section laborers—were denied recovery by the master as well as by the District Court, for the reason that all of them except 2 were seasonal furloughs effected before the decision of the ICC approving the proposed acquisition. Interstate had in previous years purchased and used some power tools for maintaining its tracks. This may have been a factor in these furloughs. In any event, after the acquisition Interstate rented from Southern more equipment and it had no occasion to recall these section laborers. The rentals were paid exclusively by Interstate. The master found, and the District Judge held, that the displacement of these men was not a result of the acquisition but instead an economic decision by Interstate itself. The situation was summarized by the District Judge as follows:

> "All of these employees but two (who were furloughed in June, 1961) were furloughed prior to the acquisition of Interstate by Southern. There is little evidence to indicate that the reason for this furlough was other than the seasonal cut-offs which have also occurred in past years. There is some evidence that these men were furloughed because of the introduction

of machinery and equipment used in the maintenance of tracks, but the record shows that there was very little equipment owned by Interstate prior to the acquisition. The Master found that these employees would have been called back for work except for the fact that after the acquisition Interstate began to *rent* some modern track and maintenance equipment which has replaced these employees.

"No work has been removed from Interstate lines, but rather the same amount of work is being done with these machines and fewer men. It seems clear that the utilization of machines was a case of internal technological improvement. There is no way to move any work on the track over to the Southern, and the improvements could have been made by Interstate whether or not Southern had purchased it."

It was thus an economy measure which had begun before Southern's acquisition and expanded thereafter. Hence there is no need to consider the question, mentioned by the Court and discussed in the briefs and in oral argument, of whether or not a technological improvement adopted after the acquisition of control is a factor of prejudice to a former or furloughed employee.

Clerks

Seven employees classified as clerks were furloughed in December 1960 and January 1961. Their jobs were either abolished as a result of economies of operation and installation of office machines, which had been under study since 1958, or the employees in the discontinued positions having higher seniority forced them out of their jobs. In a general

determination covering other claimants also, the District Judge concluded that none of these 7 were furloughed by reason, or in anticipation, of Southern's acquisition. These appellants do not show reversible error in this decision.

After the acquisition the accounting department of Interstate was transferred to Atlanta, Georgia. It caused the termination of 16 jobs. This affected 34 employees of Interstate. They were indemnified in accordance with the Act and the New Orleans Conditions and they are not plaintiffs here.

The judgment of the District Court will be

Affirmed.